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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

BOZO KELAVA,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

PAUL J. WATFORD
Counsel of Record
DANIEL L. GEYSER
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner

QUESTIONS PRESENTED

In *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), this Court held that a statute is impermissibly retroactive if it "attaches new legal consequences to events completed before its enactment." In the case below, the Ninth Circuit sought to define the temporal scope of § 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which repealed the Attorney General's prior discretion to waive the deportation of resident aliens. In concluding that § 304(b) reached petitioner's pre-enactment conduct, the Ninth Circuit held that an aggrieved party cannot prevail under *Landgraf* without *also* showing both subjective and reasonable reliance on the prior state of the law. The circuit purported to rest its holding on *INS* v. *St. Cyr*, 533 U.S. 289 (2001), where this Court, construing the same § 304(b), found an "obvious and severe" retroactive effect where a party could prove reliance on formerly available relief. A three-way circuit split has emerged in the wake of *St. Cyr*'s holding.

The questions presented are:

1. Whether step two of *Landgraf*'s analysis requires proof of both subjective and reasonable reliance (as the Ninth Circuit held below), proof of only reasonable reliance (as the Third Circuit has held), or no proof of reliance at all (as the Fourth Circuit has held), so that IIRIRA may not be construed to attach new legal consequences to petitioner's pre-enactment conduct.

2. Whether the Ninth Circuit's holding – that the same provision in the same statute can be construed to apply both retrospectively (here) and not retrospectively (*St. Cyr*) at the same time – conflicts with this Court's holding in *Clark* v. *Martinez*, 125 S. Ct. 716 (2005), that courts cannot "give the same statutory text different meanings in different cases."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bozo Kelava respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-11a) is reported at 434 F.3d 1120. The order of the Board of Immigration Appeals (Pet. App. 12a-16a) and the written decision and order of the immigration judge (Pet. App. 17a-33a) are unreported.

JURISDICTION

The court of appeals initially entered its judgment on June 7, 2005. On January 12, 2006, the court amended its opinion and simultaneously entered an order denying petitioner's petition for panel and en banc rehearing. Pet. App. 1a-2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-597, provides in full: "Section 212(c) (8 U.S.C. 1182(c)) is repealed."

Reprinted in an appendix to this petition (Pet. App. 34a-36a) are pertinent provisions of Sections 1182(a) and 1182(c) of Title 8, United States Code, as in effect in 1978; Section 1227(a) of Title 8; Section 1229b(c) of Title 8, as in effect beginning April 1, 1997; and Sections 601(a), 601(d) and 601(e) of the Immigration Act of 1990, Pub. L. No. 101-649, tit. VI, 104 Stat. 5075-77.

STATEMENT

1. a. The immigration statutes have long included waiver provisions to protect immigrants who present substantial equities. Under former § 212(c) of the Immigration and Nationality Act – the provision at issue here – the Attorney General had broad discretion to waive the deportation of resident aliens. The relief granted under § 212(c) was full relief and resulted in the termination of immigration proceedings; the alien resident would retain his legal permanent resident status and would no longer be subject to deportation on the ground that prompted the initial proceedings. See *Matter of Gordon*, 20 I. & N. Dec. 52 (BIA 1989).[1]

Although § 212(c) relief was discretionary, "the BIA developed criteria, comparable to common-law rules, for deciding when deportation is appropriate." *INS* v. *St. Cyr*, 533 U.S. 289, 295 n.5 (2001). These equitable factors included family ties, length of residence, deportation's hardship to the alien and his family, service in the military, employment history, property or business ties, community service, proof of genuine rehabilitation, and the alien's good character. See, *e.g.*, *Matter of Marin*, 16 I. & N. Dec. 581, 584-85 (BIA 1978). In the years immediately preceding IIRIRA, approximately half of § 212(c) applications were granted. See *St. Cyr.*, 533 U.S. at 296 n.5.

b. In 1996, Congress repealed the Attorney General's discretion under § 212(c) when it enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). See Pub. L. No. 104-208, Div. C, § 304(b),

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[1] By its terms, § 212(c) is "literally applicable only to exclusion proceedings," but the Board of Immigration Appeals (BIA) has long interpreted § 212(c) "to authorize any permanent resident alien with 'a lawful unrelinquished domicile of seven consecutive years' to apply for a discretionary waiver from deportation." *INS* v. *St. Cyr*, 533 U.S. 289, 296 (2001).

110 Stat. 3009, 3009-597. Section 304(b) of the act effectuated this change with a single sentence: "Section 212(c) (8 U.S.C. 1182(c)) is repealed." In a separate provision of IIRIRA, Congress replaced the old section with a new form of discretionary relief, called "cancellation of removal." Although this new procedure effectively operates in the same fashion and considers the same equitable factors as former § 212(c), Congress made this new relief expressly unavailable to aliens who have engaged in terrorist activity. See 8 U.S.C. § 1229b(c)(4).

c. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court addressed the retroactivity of IIRIRA's amendments as applied to pre-enactment conduct and the continued availability of § 212(c) relief. To determine the temporal scope of § 304(b)'s repeal, the Court followed the "familiar" two-step analysis in *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), and the canon of statutory construction for determining the retroactivity of civil statutes. See 533 U.S. at 316, 320.

Applying *Landgraf*'s step one, the Court first held that Congress had not clearly prescribed § 304(b)'s temporal reach. *Id.* at 320. Because the statute was ambiguous on its face, the Court proceeded to the second step of *Landgraf*'s analysis, which asks whether applying the new provision to pre-enactment conduct would result in an impermissible retroactive effect. *Id.* at 320-21. Under this second step, the Court explained, "'[t]he inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about "whether the new provision *attaches new legal consequences* to events completed before its enactment."'" *Id.* at 321 (emphasis added). Although that judgment "'should be informed and guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations,"'" this Court stated that "[a] statute has retroactive effect when it '"takes away or impairs vested rights acquired under existing laws, or creates a new

obligation, imposes a new duty, or *attaches a new disability*, in respect to transactions or considerations already past * * * ."'" *Ibid.* (emphasis added).

In applying that step-two analysis, the Court held that construing § 304(b) to reach St. Cyr's pre-enactment conviction would have an impermissible retroactive effect:

> IIRIRA's elimination of any possibility of §212(c) relief * * * clearly "'attaches a new disability, in respect to transactions or considerations already past.'" * * * Prior to AEDPA and IIRIRA, aliens like St. Cyr had a significant likelihood of receiving § 212(c) relief. Because respondent, and other aliens like him, almost certainly relied upon that likelihood in deciding whether to forgo their right to a trial, the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect.

Id. at 321, 325. Accordingly, having identified "nothing in IIRIRA unmistakably indicating that Congress considered the question whether to apply its repeal of § 212(c) retroactively to such aliens" (step one), the Court held (step two) that "§ 212(c) relief remains available for aliens, like respondent, whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* at 326.

2. a. Petitioner is an anti-communist dissident who came to the United States from Yugoslavia as a refugee in 1969 and became a legal permanent resident in 1972. See Pet. App. 2a. In 1978, petitioner and an accomplice entered the West German Consulate in Chicago, took several employees hostage, and demanded that West Germany not extradite a prominent Croatian dissident to Yugoslavia, where petitioner feared the dissident would be tortured and executed. Pet. App. 2a-3a. After petitioner and his accomplice were allowed to speak with the dissident, they released all the hostages

unharmed. Pet. App. 3a.

As a result of this event, petitioner was convicted in federal court of conspiracy and kidnapping of foreign officials, but that conviction was later vacated as a result of procedural error. *Ibid.* Petitioner subsequently pled guilty to one charge of unarmed imprisonment of a foreign national and received a 2.5-year sentence. *Ibid.*

b. Almost 20 years later, in 1999, after petitioner unsuccessfully applied a third time for naturalization, the INS opened removal proceedings against him. Pet. App. 3a. In those proceedings, the Board of Immigration Appeals (BIA) found petitioner removable for having engaged in terrorist activity (Pet. App. 14a-15a), and also found him ineligible for § 212(c) relief (Pet. App. 15a). In reaching this latter conclusion, the BIA cited only (i) the 1991 version of former § 212(c), with a parenthetical stating that this version of the statute "exclud[ed] terrorist activity from section 212(c) eligibility"; (ii) § 601(d) of the Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, tit. VI, 104 Stat. 5075-77, which amended § 212(c) into the version that existed in 1991 (and which is therefore redundant with the BIA's first citation); and (iii) "section 240A(c)(4) of the Act," which is IIRIRA's current bar on discretionary relief for aliens who engage in terrorist activities. Pet. App. 15a.

3. Petitioner timely petitioned the Ninth Circuit to review the BIA's decision, asking whether IIRIRA § 304(b) or IMMACT § 601(d) may apply retroactively to foreclose § 212(c) relief in his case. Pet. App. 5a-11a. On January 12, 2006, the Ninth Circuit affirmed the BIA's decision and

accordingly denied the petition. See Pet. App. 1a-11a.[2]

a. The court of appeals first held that this Court's ruling in *St. Cyr* did not warrant granting petitioner relief. The court acknowledged *St. Cyr*'s holding that "the elimination of § 212(c) relief" for aliens who entered pre-IIRIRA plea agreements would "attach[] * * * a new disability to considerations already past," and thus that "§ 304(b) was not retroactive" as to those aliens. Pet. App. 6a. But the court also noted that the Ninth Circuit had previously "cabined *St. Cyr* to the plea context, because of the alien's *reliance on existing law* in that situation." Pet. App. 7a (emphasis added). Based on this circuit precedent, the court found *St. Cyr* distinguishable: because IIRIRA eliminated discretionary relief for anyone who "'engaged in'" terrorist activity, not anyone *convicted* of that activity, there was "no independent significance to [petitioner's] plea." *Ibid.* Accordingly, because petitioner (unlike St. Cyr) could not have pled guilty in reliance on the availability of § 212(c) relief – he was deportable as a result of his *conduct*, not his plea or his conviction – the court held petitioner could not claim impermissible retroactivity on the strength of *St. Cyr*. Pet. App. 6a-7a.

The court likewise rejected petitioner's argument that the presence of reliance (*vel non*) was irrelevant, because *Landgraf*'s retroactivity analysis turns on proof of retroactive effects, not proof of reliance. Relying primarily on the Ninth Circuit's earlier decision in *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002), the court continued to hold that reliance is essential to the retroactivity analysis

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[2] The Ninth Circuit also held that it had jurisdiction to entertain the petition, notwithstanding that the "IJ found Kelava removable on both reviewable and nonreviewable grounds." Pet. App. 5a. Because "the BIA affirmed only the terrorist activity charge" – which is reviewable – and "expressly declin[ed] to reach the other issues presented," the court held that its review was properly "limited to the BIA's decision." *Ibid.* (citing *Toro-Romero* v. *Ashcroft*, 382 F.3d 930, 934-35 (9th Cir. 2004)).

(Pet. App. 7a), and found it implausible that petitioner could argue "he would not have committed the terrorist activity in 1978 if he had known that he might become ineligible for discretionary relief from removal" (Pet. App. 8a).

In reaching this conclusion, the panel acknowledged (and refused to follow) contrary out-of-circuit authority holding that "some sort of reliance by an alien on existing immigration laws is not a requisite in the retroactivity analysis." Pet. App. 8a (citing *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004), and *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004)). The court also acknowledged that Judge Calabresi, writing for a 2-1 majority in *Thom* v. *Ashcroft*, 369 F.3d 158 (2d Cir. 2004), "indicated that he personally would agree * * * that IIRIRA's repeal of § 212(c) relief should operate prospectively only, but found himself precluded by prior Second Circuit authority from reaching such a conclusion." Pet. App. 10a. Notwithstanding these open conflicts, the court below explained that "in the end we remain bound by existing circuit precedent" (Pet. App. 11a), and held that because petitioner could not "demonstrate reliance or any sort of 'settled expectations' on the existing immigration laws," there is "no retroactive effect in applying the IIRIRA elimination of § 212(c) relief to [petitioner]" (Pet. App. 8a, 11a (citing *Armendariz-Montoya*)).

b. The court next rejected petitioner's argument, based on *Clark* v. *Martinez*, 125 S. Ct. 716 (2005), that *St. Cyr* already settled the question of § 304(b)'s retroactivity, arguing that the same statute cannot be interpreted to apply prospectively and retrospectively at the same time. See Pet. App. 8a-11a. Describing *Clark* as "a case of simple statutory construction," the court asserted that "the *Landgraf* retroactivity analysis employed in *St. Cyr* [is] a different animal." Pet. App. 9a (footnote omitted). Specifically, the court found that, like *Clark*, "the first part of the [*Landgraf*] test involves statutory construction," but that *Landgraf*'s second step "appears to shift to an 'as applied' analysis." *Ibid.* With this "as applied"

understanding, the court found nothing wrong with "applying a new provision * * * to one group but not to another." *Ibid.* (citing *Martin* v. *Hadix*, 527 U.S. 343, 361-62 (1999), as purported support).

The court also noted that "the Supreme Court appears reluctant to extend [*Clark*'s] reach beyond cases involving statutory construction using the constitutional avoidance principle." Pet. App. 10a (citing the three-justice plurality and Justice Thomas's concurrence in *Spector* v. *Norwegian Cruise Line Ltd.*, 125 S. Ct. 2169 (2005)).[3] The court therefore refused "to use [a] broader reading of *Clark*" that would extend its analysis into "the retroactivity context." Pet. App. 10a-11a.

c. Because the court accordingly concluded that "there is no problem applying IIRIRA § 304(b)" to petitioner, it expressly declined to "consider the retroactivity of IMMACT [§ 601(d)]." Pet. App. 7a.

REASONS FOR GRANTING THE PETITION

As recently noted by the Fourth Circuit (per Judge Luttig), "substantial confusion * * * extends throughout the Courts of

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[3] The court also found some support for its conclusion in this Court's denial of certiorari in *Thom* v. *Ashcroft*, 369 F.3d 158 (2d Cir. 2004), cert. denied, 126 S. Ct. 40 (2005), which also had taken "the position that aliens who did not plead guilty prior to IIRIRA do not have the same settled expectations as the aliens in *St. Cyr*." Pet. App. 10a-11a (noting that "[n]otwithstanding the vocal dissent, a lukewarm majority opinion, and an apparent circuit split, the Court declined to take the case") (internal citation and footnotes omitted)). "Although it is difficult to discern the reasons behind denials of certiorari," the court reasoned, "if *Clark* really means what Kelava argues, *Thom* would have been an excellent vehicle to clarify that *Clark*'s analysis applies in the retroactivity context." *Ibid.* In making this argument, the court of appeals did not assert that the *Thom* petition raised the *Clark* issue, which it did not; nor did the court acknowledge that *Clark* (issued January 12, 2005) was decided after *Thom* (issued May 27, 2004).

Appeals" as to "whether a party must prove some form of reliance in order to demonstrate that a statute is impermissibly retroactive." *Olatunji*, 387 F.3d at 390-91 (also noting that, "unsurprisingly, the same confusion exists among the parties to suit in the federal courts"). This confusion has materialized into a three-way circuit split: some circuits (including the court below) have held that the aggrieved party must prove both subjective and reasonable reliance, other circuits (including the Third Circuit) require proof of only reasonable reliance, and another circuit (the Fourth) has held that a party need not prove reliance at all (subjective or reasonable), correctly recognizing that reliance is not, and has never been, essential to this Court's retroactivity analysis. The court below expressly acknowledged the deep division on this issue yet refused to reconsider its position. Likewise, the Third and Fourth Circuits have had the chance to re-evaluate their respective positions in light of the competing views of the other circuits, but neither has done so. Because the issue is both important and recurring, and because only this Court can resolve the split among the circuits, review is plainly warranted.

This Court's review also is independently warranted to resolve the manifest confusion among the lower courts regarding the *statutory* nature of the anti-retroactivity analysis. In *St. Cyr*, this Court had *already construed* the scope of the *same* § 304(b) of the *same* IIRIRA that the Ninth Circuit revisited below. But rather than defer to this Court's definitive construction – that IIRIRA applies only prospectively – the court instead held the opposite and found that the statute may apply retroactively. The court below reached this conclusion on the logic that *Landgraf*'s second step is *not* a statutory but an "as applied" challenge – presumably leading to some heretofore unknown and undefined "right" to avoid retroactive laws. But this Court has consistently characterized *Landgraf* – both steps of it – as a "canon[] of statutory construction * * * for *interpreting*

statutes that do not specify their temporal reach." *Landgraf*, 511 U.S. at 263-64 (emphasis added). Because the temporal component of a statute is just like any other component of a statute – its words, its scope, its substantive reach – it must apply *either* prospectively *or* retrospectively – but not both. The court below thus erred in endorsing "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark*, 125 S. Ct. at 727.

I. THIS COURT SHOULD RESOLVE THE THREE-WAY SPLIT OF AUTHORITY OVER WHETHER RELIANCE IS REQUIRED TO PROVE IMPERMISSIBLE RETROACTIVITY

A. The Circuit Courts Are Intractably Divided Over This Issue

The Ninth Circuit's central holding in this case is that reliance is the *sine qua non* of the retroactivity analysis: an aggrieved party cannot prove impermissible retroactivity without "demonstrat[ing] reliance or any sort of 'settled expectations' on the existing" statutory scheme. Pet. App. 8a; see also *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002) (summarily holding that there is no retroactive effect where aliens "cannot plausibly claim that they would have acted any differently" if they had known about the new law). That holding conflicts directly with the decisions of at least two courts of appeals, as the court below

expressly acknowledged.[4]

1. In *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004), the Fourth Circuit engaged in "[a] careful review of both the basis for the judicially-imposed presumption against retroactivity and the Supreme Court's retroactivity jurisprudence," and concluded that "*no form of reliance is necessary*" to invoke the bar against retroactivity. 387 F.3d at 389 (Luttig, J.) (emphasis added). On the contrary, "the fact that IIRIRA has

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[4] The Ninth Circuit's decision is consistent, however, with decisions of the First, Second, and Fifth Circuits. See, *e.g.*, *Dias* v. *INS*, 311 F.3d 456, 458 (1st Cir. 2002) (per curiam) (finding no impermissible retroactive effect where "there was not, and could not have been, reliance by the defendant on the availability of discretionary relief"); *Khan* v. *Ashcroft*, 352 F.3d 521, 523 (2d Cir. 2003) (reliance is a necessary factor to proving retroactivity); *Rankine* v. *Reno*, 319 F.3d 97, 99-102 (2d Cir. 2003) (rejecting claim because "petitioners did not detrimentally rely on the availability of discretionary relief"); *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 519-20 (5th Cir. 2006) (adopting *Rankine*'s reasoning in holding that IIRIRA's repeal of § 212(c) is not impermissibly retroactive).

The Seventh Circuit's position is not entirely clear, with certain decisions suggesting that reliance is not essential to the retroactivity inquiry but others suggesting that it is. Compare, *e.g.*, *Labojewski* v. *Gonzales*, 407 F.3d 814, 822-23 (7th Cir. 2005) (noting a lack of reliance but then *continuing* to ask whether a retroactive application would "impair rights [the aliens] possessed when they applied [for relief] or impose a new disability on an already-completed transaction"), and *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799, 808, 810 (7th Cir. 2005) ("'the array of pertinent interests listed in *Landgraf*, *Hughes Aircraft*, and other influential precedents is not exhaustive but merely illustration by synecdoche. Such listings "simply describe[] several 'sufficient,' as opposed to 'necessary,' conditions for finding retroactivity'"'"; holding that a statute operates retraoctively because it "'impair[s] rights'" the alien had when he acted), with *Montenegro* v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (approving retroactive application to aliens who "did not abandon any rights or admit guilt in reliance on continued eligibility for § 212(c) relief"), and *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998) (noting it "would border on the absurd" to suggest that aliens "might have decided not to commit drug crimes" had they known "they could not ask for a discretionary waiver of deportation").

attached new legal consequences to [an alien's] guilty plea is, alone, sufficient to sustain his claim." *Ibid.*

As the Fourth Circuit explained, the Supreme Court consistently has asked "only whether a statute *in fact* has retroactive effect"; "[i]f the presumption is that Congress does not intend statutes to operate retroactively * * * , then it follows that if a statute does *in fact* impose new legal consequences on past actions, Congress did not intend such." *Olatunji*, 387 F.3d at 394. As *Olatunji* continued:

> In other words, where Congress has apparently given no thought to the question of retroactivity whatever, there is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively. Anything more, in the face of complete congressional silence, is nothing but judicial legislation.

Ibid.

To support its point, the *Olatunji* panel examined a number of this Court's cases that found retroactive effects without *any* showing of reliance. For example, the court explained how *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), held that "the elimination of certain defenses to *qui tam* suits under the False Claims Act could not be applied retroactively to Hughes Aircraft * * * *without even a single word of discussion as to whether Hughes Aircraft * * * had relied on the eliminated defense to its detriment.*" *Id.* at 391; see also *id.* at 390 (noting that *Landgraf* "itself relied upon numerous cases where the retroactivity determination appears to have been based exclusively on the factual question of whether the statute 'change[d] the legal consequences of acts completed before its effective date,'" not whether the party relied on the prior law).

Moreover, the Fourth Circuit made clear that *St. Cyr* itself "did not purport to add a subjective reliance requirement," but rather "applied *Landgraf* to a set of facts that indicated 'an *obvious and severe* retroactive effect.'" *Id.* at 393 (quoting

St. Cyr, 533 U.S. at 325). Nor, the court concluded, did *Republic of Austria* v. *Altmann*, 541 U.S. 677 (2004), "establish a reliance requirement," noting that "the Court neither said nor held that the *legal framework* for determining whether a statute is impermissibly retroactive includes consideration of reliance." *Olatunji*, 387 F.3d at 393 (explaining that *Altmann*'s formulation of the retroactivity test "stands as yet further confirmation that the Supreme Court intends Justice Story's framework [the standard quoted in *Landgraf*] to be sufficient for application of the 'traditional presumption' against retroactivity") (citations omitted).

Accordingly, in the Fourth Circuit, "[w]hether a plaintiff did or did not rely on a prior statutory scheme is irrelevant to whether that scheme in fact has a retroactive effect on that plaintiff." *Id.* at 391.

2. In *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004), by contrast, the Third Circuit (per Judge Becker) also rejected "the actual-reliance approach of our sister Courts of Appeals" (contrary to the Ninth Circuit), but still insisted that an aggrieved party demonstrate *reasonable* reliance (contrary to the Fourth Circuit). 373 F.3d at 493, 501. In "approaching the issue * * * from first principles of *Landgraf* retroactivity analysis" (*id.* at 501), the Third Circuit asserted that other "courts have erected too high a barrier to triggering the presumption against retroactivity" (*id.* at 491). The court noted that "[t]he Supreme Court has never required actual reliance or evidence thereof in the *Landgraf* line of cases," explaining that *Landgraf* found impermissible retroactivity "without once referring to the defendant's conduct or the defendant's actual expectations," and that "[l]ikewise, in *Hughes Aircraft*, the particular situation or expectations of the defendant were immaterial to the Court's analysis." *Ibid.* ("it is difficult to see" how either defendant "could have established actual reliance on the prior state of the law").

Like the Fourth Circuit in *Olatunji*, the Third Circuit also rejected the argument that *St. Cyr* "convert[ed] *quid pro quo*

into a rigid baseline test." *Id.* at 499. The court explained that *St. Cyr* did "not create an additional requirement necessary to establish retroactive effect," but simply "highlight[ed] the obvious and severe retroactive effect of applying IIRIRA to aliens who pleaded guilty." 373 F.3d at 499.

Still, the court read *St. Cyr* together with *Martin* v. *Hadix*, 527 U.S. 343 (1999), to find "a 'reasonable reliance' formulation in [this Court's] retroactivity analysis." *Id.* at 493. As a result, in the Third Circuit, unlike in the Fourth Circuit, "courts are to concentrate on the group to whose conduct the statute is addressed * * * with a view to determining whether reliance was reasonable"; unlike in the Ninth Circuit, however, whether the party before the court actually relied is irrelevant. *Ibid.*[5]

3. Although the Ninth Circuit's decision expressly departs from these decisions of the Third and Fourth Circuits, it does find support in the decisions of other circuits, including the 2-1 decision in *Thom* v. *Ashcroft*, 369 F.3d 158, 163 (2d Cir. 2004) (holding that reliance is essential to the retroactivity inquiry). But more telling than *Thom*'s actual holding is what that court did *not* hold: a *majority* of that Second Circuit panel, in the absence of prior circuit precedent, would have come out the other way and found reliance *irrelevant* to the retroactivity analysis.

First, *Thom*'s author, Judge Calabresi, "[s]peaking only for [himself]," expressed the view that if he "were judging on a

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[5] It is not immediately obvious why *Ponnapula*'s reasoning does not lead inexorably to the Fourth Circuit's conclusion that reliance of any sort is not required to prove impermissible retroactivity. See, *e.g.*, 373 F.3d at 493 ("it is unlikely that in *Landgraf* any employer demonstrably relied no the absence of a punitive damages remedy for Title VII violations, or that in *Hughes Aircraft* any government contractor purposely arranged its billing practices *ex ante* to take advantage of a specific defense under the False Claims Act").

clean slate," he would read *Landgraf*'s step two "at a minimum" as establishing impermissible retroactivity whenever an aggrieved party could satisfy the criminal "*ex post facto*" standard (*id.* at 163 n.6) – a standard that pointedly does *not* require any showing of reliance. See, *e.g.*, *Collins* v. *Youngblood*, 497 U.S. 37, 42 (1990); see also *Hughes Aircraft*, 520 U.S. at 948 (noting that a law that abolishes an affirmative defense violates the *ex post facto* clause, citing *Collins*). Even while predicting that "the Supreme Court's future decisions in this field will confirm such readings of *Landgraf*" and that he was "very much inclined to agree with the dissent" (which likewise found reliance irrelevant), Judge Calabresi read prior circuit precedent "as foreclosing the argument that the conviction of an alien, without more, presents a retroactivity problem." *Thom*, 369 F.3d at 163 n.6.

Second, in a dissenting opinion, Judge Underhill reached a conclusion materially indistinguishable from the Fourth Circuit's position in *Olatunji*. Specifically, Judge Underhill explained that "there is no support for the proposition that a showing of reliance is a necessary condition to a finding of retroactive effect." *Thom*, 369 F.3d at 172 (Underhill, D.J., dissenting). He noted that, "[o]n several occasions, including in *Landgraf* itself, the Supreme Court reached the ultimate issue – whether new legal consequences attach to a past event – without the need to resort" to reliance, citing *Landgraf*, *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 313 (1994), and *Hughes Aircraft*. 369 F.3d at 170 (Underhill, D.J., dissenting). Finally, Judge Underhill also explained the Second Circuit's over-reading of *St. Cyr* – how it transformed reliance from a sufficient condition into a necessary one – by stating that "[t]he existence of reliance supported the holding in *St. Cyr*, but the holding in *St. Cyr* does not require the existence of reliance." *Id.* at 172-73.

Accordingly, although two of three judges on the panel would find a statute impermissibly retroactive without any

showing of reliance, *Thom* was the unavoidable result of prior circuit precedent. *Thom* plainly underscores the fact that only this Court now can resolve the split of authority on this important issue. See *Hernandez* v. *Gonzales*, 437 F.3d 341, 352 (3d Cir. 2006) ("our colleagues in the Second and Ninth Circuits engage in a retroactivity analysis different from the one we apply"); *Garcia-Ramirez* v. *Gonzales*, 423 F.3d 935, 944-46 (9th Cir. 2005) (Fisher, J., joined by D.W. Nelson, J., concurring) (acknowledging the Fourth Circuit's holding "that consideration of reliance is irrelevant to statutory retroactivity analysis," but still asserting that the Ninth Circuit should "not dispense with the requirement of reasonable reliance"); *Dinnall* v. *Gonzales*, 421 F.3d 247, 261 n.15 (3d Cir. 2005) ("[w]e are * * * bound by *Ponnapula* and its interpretation of Supreme Court precedent"); see also *Atkinson* v. *Elwood*, No. Civ.A.01-CIV-5462, 2004 WL 2943665 (E.D. Pa. Dec. 20, 2004) (finding "compelling" the Fourth Circuit's opinion that "'reliance, in any form, is irrelevant to the retroactivity inquiry,'" but recognizing that the court was bound by *Ponnapula*'s rule "that reasonable reliance is and should be considered when conducting a retroactivity analysis").[6]

B. The Decision Below Contravenes This Court's Precedent

1. Review is also warranted because the decision below sharply departs from this Court's precedent. First, this Court

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[6] As for the lower court's effort to read into this Court's denial of certiorari in *Thom* (see Pet. App. 10a-11a), suffice it to say that the Second Circuit issued its 2-1 decision *before* the Fourth Circuit issued its contrary analysis in *Olatunji*. Compare *Thom* (decided May 27, 2004) and *Olatunji* (decided October 19, 2004). As a result, the Second Circuit did not have the chance – as the Ninth Circuit below has now had – to reconsider its position in light of the emerging circuit conflict. The Second Circuit's decision therefore was a poor (and premature) vehicle for considering this ripened circuit conflict, whereas this case presents a clear and renewed opportunity for resolving this split.

has never established reliance as the *sine qua non* of retroactivity. On the contrary, this Court has repeatedly articulated the retroactivity standard as whether a new law "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" *Landgraf*, 511 U.S. at 269 (quoting Justice Story's famous test). While the *Landgraf* Court did state that that specific formulation is not the only test for retroactivity, it tellingly failed to mention reliance *even once* in a footnote articulating no fewer than *five* other such formulations. *See id.* at 269 n.23.[7]

Although this Court has sometimes referred to "reasonable reliance" and "settled expectations" in the retroactivity context, it has done so in explaining that "[a]ny test of retroactivity will leave room for disagreement in *hard cases*," and that reliance may offer "sound guidance" in such situations. *Id.* at 270 (emphasis added); see also *Marrie* v. *SEC*, 374 F.3d 1196, 1207 (D.C. Cir. 2004). But "hard cases" are not typical cases, and offering "sound guidance" is not the same thing as being a necessary condition to prove retroactivity.

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[7] The five formulations were: (i) "'A law is retrospective if it "changes the legal consequences of acts completed before its effective date,"'" quoting *Miller* v. *Florida*, 482 U.S. 423, 430 (1987); (ii) "retroactive statute gives 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed,'" quoting *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913); (iii) "a retroactive statute is one that 'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability,'" quoting *Sturges* v. *Carter*, 114 U.S. 511, 519 (1885); (iv) "Justice Story's definition from *Society*," as quoted in Black's Law Dictionary 1184 (5th ed. 1979); and (v) the terms "retroactive" and "retrospective" "'describe acts which operate on transactions which have occurred or rights and obligations which existed before passage of the act,'" quoting N. Singer, Sutherland on Statutory Construction § 41.01, p. 337 (5th rev. ed. 1993).

2. a. Moreover, in its application, this Court has not required reliance as a necessary element to determine impermissible retroactivity. On the contrary, in a series of cases, once a party had proved that a new law would "'attach[] a new disability, in respect to transactions or considerations already past,'" this Court declared the statute impermissibly retroactive. *Hughes Aircraft*, 520 U.S. at 948.

In *Hughes Aircraft*, for example, this Court held that an amendment to the False Claims Act would have an impermissibly retroactive effect – without first requiring any party to show that it had relied on the prior law. 520 U.S. at 951-52; see also *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102, 109 (4th Cir. 2001) (explaining that *Hughes Aircraft* held "that the amended False Claims Act operated retroactively without discussing whether any party detrimentally relied on previous law").

Likewise, in *Rivers*, this Court construed the temporal scope of a statute that "simply enact[ed] a rule that the parties believed to be the law when they acted." 511 U.S. at 309. Even though there was no evidence that the parties relied on the old law – and, in fact, some evidence suggesting they had not – this Court found an impermissibly retroactive effect because the law "creates liabilities that had no legal existence before the Act was passed." *Id.* at 313. The Ninth Circuit has not explained how its case-dispositive reliance requirement is consistent with *Hughes Aircraft*, *Rivers*, or any other case where this Court has searched for retroactive *effects*, not reliance.

b. Nor does *St. Cyr* cast any doubt on this unbroken line of precedent. In that case, this Court merely found that "the elimination of any possibility of §212(c) relief" would have "an *obvious and severe* retroactive effect." *St. Cyr*, 533 U.S. at 325 (emphasis added). That the Court chose to illustrate impermissible retroactivity by pointing to reliance interests hardly suggests that it was *requiring* reliance as a threshold matter. Indeed, such a suggestion would be wrong for two

reasons. First, the Court defined the inquiry as "whether the new provision attaches new legal consequences to events completed before its enactment" – the traditional standard that is applied in other cases and does not require reliance. *Id.* at 321 (internal quotation marks omitted). And, second, even if this Court had applied a new, reliance-based standard, it also confirmed that there is more than one way to prove impermissible retroactivity: Justice Story's test, said *St. Cyr*, "does not purport to define the outer limit of impermissible retroactivity. Instead, it simply describes several *sufficient*, as opposed to *necessary*, conditions * * * ." *Id.* at 321 n.46 (internal quotation marks omitted). There is simply no basis for assuming, as did the court below, that a *sufficient* condition in one case automatically becomes a *necessary* condition in all others.

3. Finally, to focus too heavily on reliance is to ignore that the animating rationale of the anti-retroactivity presumption extends beyond mere reliance interests. The presumption is also meant to constrain the government's ability to punish unpopular groups after the fact, *Landgraf*, 511 U.S. at 266, and to make Congress consider the "*potential*" unfairness – whether rooted in reliance interests or not – of judging past conduct under new laws. *Id.* at 268 (emphasis added). Requiring reliance as a threshold test for impermissible retroactivity would undermine both of these interests and unduly limit the purpose of the presumption.

C. Whether Reliance Is A Necessary Factor In The Retroactivity Analysis Is A Recurring Question Of Great Importance

This Court has already confirmed that the anti-retroactivity canon gives rise to both important and recurring issues, particularly in the immigration context. This Court in *St. Cyr* emphasized the "importance" of the retroactivity issue (533 U.S. at 293) and its serious practical implications: "the class of aliens whose continued residence in this country has

depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted." *Id.* at 295-96. Moreover, because the Constitution expressly contemplates "an uniform Rule of Naturalization," U.S. Const. art. I, § 8, disuniformity in this area is especially problematic. Yet without review from this Court, the conflicting views in the lower courts will continue to produce different rules for different resident aliens, all depending on where they happen to reside. Indeed, in light of the Fourth Circuit's decision in *Olatunji*, it is clear that, had this case arisen in that circuit rather than the Ninth Circuit, petitioner would have been eligible for relief.

Moreover, the importance of this issue carries over into the non-immigration context, as the same anti-retroactivity presumption applies to *all* statutes, regardless of their subject matter, that might reach pre-enactment conduct: "[T]he retroactive application of an immigration law is analyzed no differently from the retroactive application of any other civil statute." *Ponnapula*, 373 F.3d at 491 n.7 (citing *St. Cyr*, 533 U.S. at 325 n.55); see also, *e.g.*, *Princess Cruises, Inc.* v. *United States*, 397 F.3d 1358, 1366 (Fed. Cir. 2005) (looking to immigration cases in a case involving Harbor Maintenance Tax payments to determine the role of reliance in the retroactivity analysis).

It is also clear that outlining the contours of retroactivity analysis "presents a recurring question in the law." *Martin*, 527 U.S. at 352. Indeed, looking to this very issue, the Eleventh Circuit has stressed "the plethora of cases that have inundated our Circuit and our sister Circuits," and noted the "burdensome and protracted litigation" it has produced. *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1275 n.7 (11th Cir. 2002). This Court's guidance is essential in reducing this burden on the lower courts.

D. This Case Is An Excellent Vehicle For Considering The Question Presented

1. This case presents an ideal vehicle for resolving the split of authority over the role of reliance in the retroactivity analysis. The decision below expressly (and exclusively) turned on petitioner's failure to demonstrate that he relied on the prior state of the law. Petitioner did not allege reasonable reliance, so there is no predicate issue as to what constitutes "reasonableness." Nor is there any serious dispute that applying § 304(b) retroactively in this case would "attach[] new legal consequences [or a new disability] to events completed before its enactment." *Landgraf*, 511 U.S. at 269-70. Before IIRIRA, petitioner was eligible for § 212(c) relief; after IIRIRA, petitioner is not. See *St. Cyr*, 533 U.S. at 325.

Consequently, all that remains for this Court to decide is the role of reliance: If the Ninth Circuit is correct that reliance is the *sine qua non* of the retroactivity analysis, then petitioner's claim fails; however, if petitioner is correct that proving reliance is not necessary to the analysis, then petitioner must prevail. Reliance is therefore outcome-

dispositive (and the only issue) in this case.[8]

2. Although this case is particularly well-suited for deciding the question presented, this Court may consider holding this petition pending the resolution of *Fernandez-Vargas* v. *Gonzales*, No. 04-1376. That case presents the

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[8] In the course of deciding that § 304(b) resolved petitioner's claim, the court below briefly mentioned – and expressly declined to decide – two alternative arguments for finding petitioner ineligible for relief. The court's decision thus stands or falls on the strength of its § 304(b) analysis. In any event, although these alternative questions would remain open for decision on remand, cf. *Neder* v. *United States*, 527 U.S. 1, 25 (1999), they are wholly without merit. First, the court noted that § 601(d) of IMMACT also eliminated § 212(c) relief for aliens like petitioner, and thus could possibly serve as an independent ground for denying him relief. See Pet. App. 7a (explaining that "we need not consider the retroactivity of IMMACT"). But Congress drafted this provision with an *express effective date* that, on its face, plainly excludes petitioner: "the amendments made by this section [§ 601] and by section 603(a) of this Act *shall apply to individuals entering the United States on or after June 1, 1991*." IMMACT, Pub. L. No. 101-649, tit. VI, § 601(e), 104 Stat. 5077 (emphasis added). There is no dispute that petitioner entered the United States long before 1991. See Pet. App. 2a.

Second, the panel also noted the government's argument that petitioner was ineligible for § 212(c) relief even under the statute as it existed in 1978, at the time petitioner acted. Pet. App. 11a (quoting 8 U.S.C. § 1182(a)(28)(F)(ii) (1976)). But this provision eliminates relief only for aliens who "advocate or teach" the use of terrorism; by its plain terms, it does not apply to terrorist activity *per se*. Thus, not only does this provision not reach petitioner, but affirming the BIA on this ground would require a series of factual findings absent from the administrative record. But this argument also fails for a more fundamental reason: *the BIA did not rest its decision on this ground*. Indeed, nowhere in its decision did the BIA even cite this earlier version of the law or quote any of its language. This alternative ground therefore is not properly before any court: "our review is limited to the BIA's decision." Pet. App. 5a; see also, *e.g.*, *INS* v. *Ventura*, 537 U.S. 12, 16 (2002) ("A court of appeals 'is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry.'").

question whether 8 U.S.C. § 1231(a)(5), which provides for the reinstatement of a previous order of removal against an alien who has illegally reentered the United States, applies to an alien whose illegal reentry predated the effective date of the provision.

The issue in *Fernandez-Vargas* is broadly related to the issue in this petition, but the disposition of that case might not resolve the important and distinct question presented here. In fact, *Fernandez-Vargas* presents several kinds of predicate issues *not* present in this case, including issues under step one of *Landgraf*'s analysis; issues related to Fernandez-Vargas's illegal status (by contrast, petitioner here is a resident alien); and issues related to whether Fernandez-Vargas had a vested right in seeking particular relief (and thus satisfies *Landgraf*'s standard in the first place). These issues, among others, may dispose of that case without the need to decide the status of reliance as a factor in the retroactivity analysis.

If the Court does reach the reliance issue, then it may be appropriate to grant this petition, vacate the judgment below, and remand the matter to the Ninth Circuit for reconsideration in light of *Fernandez-Vargas*. But if the Court does not reach the reliance issue in that case, then this petition continues to present an excellent vehicle for deciding this question.

II. THE NINTH CIRCUIT'S DECISION ALSO CONFLICTS WITH THIS COURT'S DECISION IN *CLARK*, WHICH HELD THAT THE SAME STATUTE CANNOT MEAN TWO DIFFERENT THINGS AT THE SAME TIME

The Ninth Circuit's decision also presents a question of exceptional importance regarding the very nature of the retroactivity inquiry itself and its relation to *Clark* v. *Martinez*, 125 S. Ct. 716 (2005).

In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court held that § 304(b) of IIRIRA could not be construed to apply

retroactively to an alien who had engaged in illegal conduct prior to IIRIRA's enactment. See 533 U.S. at 326. In so holding, this Court explained that it was engaging in "a matter of *statutory interpretation*," *id.* at 298 (emphasis added) – it was determining whether the statute should be "'construed to have retroactive effect,'" *id.* at 315, and the Court determined that it should not.

In this case, notwithstanding *St. Cyr*'s definitive statutory construction, the Ninth Circuit held that the *same* § 304(b) of the *same* IIRIRA *can* be construed to have retroactive effect. Pet. App. 8a-11a. In so holding, the court followed prior circuit authority, *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116 (9th Cir. 2002), to justify *reinterpreting* § 304(b) on a case-by-case basis. It determined, in essence, that *each* alien who comes before the court could present different circumstances and thus face a different version of the statute: for some, one that applies § 304(b) retroactively, while for others, one that does not.

The court did not – because it could not – justify this result by pointing to some distinction in the statutory text. In its entirety, IIRIRA § 304(b) reads as follows: "Section 212(c) (8 U.S.C. 1182(c)) is repealed." The plain text of § 304(b) does not distinguish between different classes or categories of aliens; it does not differentiate between aliens who pled guilty to a crime or instead went to trial, and its application does not depend on the ground of deportation involved. The text simply repeals former § 212(c) in its entirety, and thereby applies to *all* aliens.

Nevertheless, if the panel's decision stands, in the Ninth Circuit the meaning of § 304(b) will vary with the party before the Court. That result would conflict with this Court's reasoning in *Clark* v. *Martinez*, 125 S. Ct. 716 (2005). In *Clark*, this Court held that courts cannot give the same statutory text a different meaning depending on the party before the court. As *Clark* made clear, it makes no difference that some aliens might not raise retroactivity concerns: "Be

that as it may, it cannot justify giving the *same* [statutory] provision a different meaning when such aliens are involved." 125 S. Ct. at 724. "If one [statutory construction] would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." *Ibid.* As noted above, "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Id.* at 722-23.

It is impossible to square the Ninth Circuit's holding with this principle. It makes no difference that the *St. Cyr* Court used language in its opinion that appeared to cabin its holding to aliens who pled guilty in reliance on the availability of § 212(c) relief. As the Court explained in *Clark*, this sort of argument "mistakes the reservation of a question with its answer." 125 S. Ct. at 723 (noting that a prior case also attempted, unsuccessfully, to narrow its result by stating that "'[a]liens who have not yet gained initial admission to this country would present a very different question'"). According to *Clark*, the question here may be "indeed different from the question decided in [*St. Cyr*], but because the statutory text provides for no distinction between [classes of aliens], we find that it results in the same answer." *Ibid.*

Nor is it relevant that *Clark* relied on the canon of constitutional avoidance, not the "antiretroactivity canon." *Landgraf*, 511 U.S. at 278. Both relate to statutory construction, and thus both lead to statutory interpretations. See, *e.g.*, *id. at* 263-64 (1994) (the analysis "is framed as a generally applicable rule *for interpreting statutes* that do not specify their temporal reach"). In both cases, the statute must ultimately have a single meaning, not changing depending on the party before the court at any given point.

Nor, again, is the court below correct that *Landgraf*'s second step shifts to an "as applied" challenge. Pet. App. 9a. That contention simply cannot be squared with the very holding in *St. Cyr*: "*as a matter of statutory interpretation*,

[the alien] is not eligible for discretionary relief." 533 U.S. at 298 (emphasis added). The notion that a party has an "as applied" right to avoid retroactive applications is also inconsistent with *Landgraf* step one, which plainly allows such retroactive applications where Congress speaks clearly. Cf. *Theodoropoulos* v. *INS*, 313 F.3d 732, 740 (2d Cir. 2002) (Walker, C.J., concurring) (asserting that the retroactivity issue involves "a statutory interpretation," and "not a constitutional challenge"). Finally, the court is manifestly wrong in suggesting that Congress left to the courts the role to "judicial[ly] legislat[e]" the temporal scope of ambiguous statutes: "where Congress has apparently given no thought to the question of retroactivity whatever, there is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively." *Olatunji*, 387 F.3d at 394.[9]

The *St. Cyr* Court interpreted the same statutory provision at issue in the instant case and concluded that it did not apply retroactively. There is nothing in the statutory text that would allow the court below to distinguish between the two petitioners involved (St. Cyr and Kelava): either § 304(b) repealed discretionary relief or it did not. But it could not – as the Ninth Circuit would have it – somehow do both.

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[9] The court below asserted that *Martin* v. *Hadix*, 527 U.S. 343 (1999), is an example of this Court applying a new provision "to one group but not to another." Pet. App. 9a. *Martin*, of course, did no such thing. The *Martin* Court simply determined that the statute applied prospectively only – and thereby applied it prospectively to *all* groups. See 527 U.S. at 358. The fact that pre-enactment conduct was still governed by prior law hardly proved that the temporal scope of the new statute changed meaning depending on the party before the court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL J. WATFORD
Counsel of Record
DANIEL L. GEYSER
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071
(213) 683-9100

APRIL 2006

APPENDIX

APPENDIX A

No. 03-73689

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Bozo KELAVA, Petitioner,

v.

Alberto R. GONZALES,* Attorney General, Respondent.

Argued and Submitted May 9, 2005
Opinion Filed June 7, 2005
Amended Jan. 12, 2006

On Petition for Review of an Order of the Board of Immigration Appeals.

Before: KLEINFELD, HAWKINS, and GRABER, Circuit Judges.

ORDER AND AMENDED OPINION

MICHAEL DALY HAWKINS, Circuit Judge:

ORDER

The Opinion filed on June 7, 2005, and appearing at 410 F.3d 625 (9th Cir. 2005), is hereby amended, and the amended Opinion will be filed concurrently with this Order.

With the Opinion as amended, the panel has voted to deny

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* Alberto R. Gonzales is substituted for his predecessor, John Ashcroft, as Attorney General of the United States, pursuant to Fed. R. App. P. 43(c)(2).

Petitioner's Petition for Rehearing and Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc and no Judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing and the Petition for Rehearing En Banc are DENIED.

No further petitions for rehearing or for rehearing en banc will be entertained by this court.

OPINION

Bozo Kelava, a Croatian national, seeks review of a decision by the Board of Immigration Appeals ("BIA"). The BIA concluded Kelava was ineligible for a discretionary waiver of inadmissibility or cancellation of removal for having engaged in terrorist activity. In an issue of first impression, Kelava argues it is impermissibly retroactive to deny him eligibility for previously available discretionary relief, relying on the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). We deny his petition.

FACTS AND PROCEDURAL HISTORY

Kelava, an anti-communist dissident, came to the United States from the Croatian region of the former Yugoslavia as a refugee in 1969. He became a legal permanent resident in 1972.

In the late 1970's, the Federal Republic of Germany ("West Germany") began deporting and extraditing Croatian dissidents to Yugoslavia where they were allegedly being tortured and executed. In April 1978, Kelava and another man entered the West German Consulate in Chicago, armed with handguns, ropes and a phony bomb. *United States v. Kelava*, 610 F.2d 479, 480 (7th Cir. 1979). They seized several employees (including a Consular Officer), demanding that West Germany refuse to extradite Stepan Bilandzic, a

prominent Croatian dissident, to Yugoslavia. After being permitted to speak with Bilandzic, Kelava and his cohort released the hostages unharmed. *Id.*

Kelava and his companion were initially indicted and convicted in federal court of conspiracy and kidnapping of foreign officials, but the district court judge later determined that he had erred in instructing the jury on a lesser included offense and ordered a new trial. The government then obtained a new indictment charging the defendants with armed imprisonment, based on the same facts. On appeal, the Seventh Circuit determined that the defendants could be retried, but only for simple (unarmed) imprisonment, because this was a lesser included offense of the original kidnapping indictment. *Id.*

In January 1980, Kelava pled guilty to one charge of unarmed imprisonment of a foreign national, and was sentenced to two and a half years in prison. Nearly 20 years later—shortly after Kelava applied for naturalization a third time—the INS[1] commenced removal proceedings against Kelava, alleging he was removable for having been convicted of an aggravated felony pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii). In June 2000, the INS filed an additional charge, alleging Kelava was removable for having engaged in terrorist activity under 8 U.S.C. § 1227(a)(4)(B).[2]

The immigration judge ("IJ") sustained both allegations and determined that, as a result, Kelava was precluded from

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[1] The INS was abolished effective March 1, 2003, and its functions transferred to the newly formed Department of Homeland Security. *See* 6 U.S.C. § 542. As the agency was known as the INS at all times pertinent to this appeal, we refer to it as such in this opinion.

[2] "Terrorist activity" is defined as "[t]he seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person ... to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained." 8 U.S.C. § 1182(a)(3)(B)(iii)(II).

seeking a waiver of inadmissibility under former § 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c), commonly referred to as a "§ 212(c) waiver."[3] On appeal, the BIA failed to address the IJ's determination that Kelava had been convicted of an aggravated felony, and instead affirmed the removal under the terrorist activity charge. The BIA also rejected Kelava's argument that he could nonetheless seek § 212(c) relief. Kelava timely petitioned this court for review.

DISCUSSION

I. Jurisdiction

We begin by noting that, although the IJ found Kelava removable for being convicted of an aggravated felony, we are not deprived of jurisdiction to hear his appeal under 8 U.S.C. § 1252(a)(2)(C), because the BIA chose not to address the aggravated felony conviction in its decision, basing its decision solely on the terrorist activity charge.

We addressed a similar situation in *Toro-Romero v. Ashcroft*, 382 F.3d 930 (9th Cir. 2004). There, the IJ found Toro-Romero removable for having been convicted of a crime involving moral turpitude and for falsely representing himself as a United States citizen. While § 1252(a)(2)(C) would have prohibited this court's jurisdiction over the moral turpitude removal, the BIA affirmed Toro-Romero's removal only on the false representation ground, expressly declining to decide any other issues raised by Toro-Romero on appeal. *Id.* at

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[3] Section 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 304(b), and was replaced with a new form of discretionary relief called cancellation of removal, codified at 8 U.S.C. § 1229b. *See Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1118 & n.1 (9th Cir. 2002) (describing history). Kelava is ineligible for relief under this new provision because he is deportable for having engaged in terrorist activity. 8 U.S.C. § 1229b(c)(4).

932-33. We explained that our review is limited to the BIA's decision, and the sole ground for the final order of removal was therefore Toro-Romero's false representation. *Id.* at 934-35. Thus, we concluded we did have jurisdiction over the petition for review. *Id.* at 935.

Likewise, in this case, although the IJ found Kelava removable on both reviewable and nonreviewable grounds, the BIA affirmed only the terrorist activity charge, expressly declining to reach the other issues presented. Even if the BIA could have found Kelava removable as an aggravated felon, it did not. Accordingly, we have jurisdiction over Kelava's petition, at least with respect to the continued availability of § 212(c) relief for those who engaged in a terrorist activity prior to the elimination of such relief.[4]

II. Availability of § 212(c) relief

The BIA agreed with the IJ that Kelava was removable because he had engaged in terrorist activity following his admission to the United States. Kelava does not contest his removability, but contends that the BIA erred by holding that, as a result, he is ineligible for a § 212(c) waiver.[5] He relies by analogy on *INS v. St. Cyr*, 533 U.S. 289 (2001).

In *St. Cyr*, the Supreme Court addressed the retroactive effect of IIRIRA § 304(b), which repealed INA § 212(c), on

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[4] In his opening brief, Kelava also asserts that he remains eligible for § 212(c) relief even though convicted of an aggravated felony. Because the BIA did not affirm the aggravated felony ground for removal, this argument is not properly before us in this appeal. For the same reason, we deny Kelava's Motion for Leave to File Supplemental Brief.

[5] At least, Kelava did not contest his removability on this ground before the BIA or in his briefs to this court. At oral argument, Kelava appeared to shift his argument and contest the retroactive application of the "terrorist activity" definition. Because he failed to exhaust this issue before the BIA, we lack jurisdiction to consider this argument, and express no opinion on the merits of his argument. *See Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004).

aliens who were otherwise eligible for such relief but had pled guilty to an aggravated felony prior to IIRIRA's enactment. The Court first considered whether Congress clearly directed the law to be applied retrospectively, concluding that it had not. 533 U.S. at 316-20.

The Court then determined whether the application of the statute would result in a retroactive effect. *Id.* at 320. The Court noted that a statute has retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* at 321 (internal quotation marks omitted). The Court went on to conclude that the elimination of § 212(c) relief for those who entered into plea agreements prior to the enactment of IIRIRA attached such a new disability to considerations already past. *Id.* at 321.

The Court explained that "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *Id.* at 322. The Court noted that § 212(c) waivers were granted rather frequently leading up to IIRIRA, and that preserving eligibility for such relief was "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. The Court thus concluded that § 304(b) was not retroactive, and that therefore § 212(c) relief remained available to aliens whose convictions were obtained through plea agreements and who would have otherwise been eligible for § 212(c) relief at the time of their plea. *Id.* at 326.

Relying on *St. Cyr*, Kelava argues that because he pled guilty in 1980, IIRIRA § 304(b) should not preclude him

from seeking relief under § 212(c) either.[6] What Kelava fails to recognize is that his removability does not hinge on a "conviction." To prove removability, the government need only establish that Kelava "engaged in" a terrorist activity "at any time after admission"; there is no requirement that he be "convicted of" engaging in such actions. 8 U.S.C. § 1227(a)(4)(B).

In *St. Cyr*, on the other hand, the guilty plea supplied the conviction necessary for removal. The Court thus focused on the considerations present when the alien decided to plea instead of going to trial, noting that competent defense counsel would have advised the alien of the immigration consequences of a plea. 533 U.S. at 322-23 & n.50. The Court seemed concerned that the alien had detrimentally relied on the availability of § 212(c) relief in entering the plea, giving rise to "settled expectations" that would be disrupted by the retroactive application of IIRIRA § 304(b). *Id.* at 323-24.

In Kelava's case, however, there is no independent significance to his plea—he is undisputedly removable based on his actions in 1978, regardless of his later decision to plead guilty. This does not end the inquiry, but shifts the focus from the guilty plea to the actual commission of the act. In this circuit, that distinction is significant. We have cabined *St. Cyr* to the plea context, because of the alien's reliance on existing law in that situation.

After *St. Cyr*, we reaffirmed our prior holding that there

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[6] Actually, IIRIRA was not the first time Congress eliminated § 212(c) relief for those who had engaged in "terrorist activities"—this initially occurred in 1990 with the passage of the Immigration Act of 1990 ("IMMACT"), pursuant to § 601(d) of that Act. Thus, Kelava also argues that § 601(d) of IMMACT is not retroactive. If either Act can apply to him, Kelava is ineligible for § 212(c) relief. Because we conclude there is no problem in applying IIRIRA § 304(b) to Kelava, we need not consider the retroactivity of IMMACT.

was no retroactive effect in applying § 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")—which negated § 212(c) relief for aliens who committed a qualifying controlled substance offense or an aggravated felony—to aliens who elected a jury trial instead of pleading guilty, because they "cannot plausibly claim that they would have acted any differently if they had known" about the elimination of § 212(c) relief, even though the criminal act and conviction occurred before the statute's amendment. *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1121-22 (9th Cir. 2002); *accord Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004), *cert. denied*, 126 S. Ct. 40 (2005). In *Armendariz-Montoya*, we approvingly quoted the Seventh Circuit, which pointed out the absurdity of arguing that one would not have committed a crime in the first place, or might have resisted conviction more vigorously, if he had known he could not ask for a § 212(c) waiver. 291 F.3d at 1121 (quoting *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998)); *see also Khan v. Ashcroft*, 352 F.3d 521, 523 (2d Cir. 2003) (noting that "it cannot reasonably be argued that aliens committed crimes in reliance on such a possibility [of § 212(c) relief]" (internal quotation marks omitted)).[7] It is just that sort of argument that Kelava would have to make: because there is no special immigration significance to his guilty plea, in order to demonstrate reliance or any sort of "settled expectations" on the existing immigration laws, he would have to assert that he would not have committed the terrorist activity in 1978 if he had known that he might become ineligible for discretionary relief from removal.

In his petition for rehearing, Kelava suggests that we are free to disregard *Armendariz-Montoya* because it has been

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[7] We recognize that some other circuits have disagreed with this approach, arguing that some sort of reliance by an alien on existing immigration laws is not a requisite in the retroactivity analysis. *See Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004); *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004).

effectively overruled by the Supreme Court's recent decision in *Clark v. Martinez*, 125 S. Ct. 716 (2005). We disagree.

Clark is a case of simple statutory construction. Using the doctrine of constitutional avoidance, the Supreme Court had previously construed 8 U.S.C. § 1231(a)(6) to permit the detention of removable aliens for as long as "reasonably necessary." *Zadvydas v. Davis*, 533 U.S. 678, 689, 699 (2001). *Clark* simply holds that this interpretation also applied to the other two groups of aliens specifically referred to in the same statute. 125 S. Ct. at 722.

We see the *Landgraf*[8] retroactivity analysis employed in *St. Cyr* as a different animal. Although the first part of the test involves statutory construction to determine whether Congress meant a particular provision to apply to conduct occurring before the effective date of a new law, when the answer to that question is not clear, the test appears to shift to an "as applied" analysis—whether applying the current law would have an impermissible retroactive effect by, for example, upsetting the settled expectations of the person or class of persons challenging its application. *St. Cyr*, 533 U.S. at 321. Indeed, the Supreme Court itself has recognized that applying a new provision may have a precluded retroactive effect as to one group but not to another. *See Martin v. Hadix*, 527 U.S. 343, 361-62 (1999) (declining to apply PLRA attorney fee limits to work performed before effective date, but applying fee cap to work performed after effective date of act, even though both groups involved cases filed prior to passage of the Act); *see also id.* at 360 ("*[A]s applied* to work performed after the effective date of the PLRA, the PLRA has future effect on future work; this does not raise retroactivity concerns." (emphasis added)).

In this case, the language of the current statute is clear—§ 212(c) relief is simply not available—but the question is

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[8] *See Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

whether *applying* the law in effect would have an impermissible retroactive effect. Reading *Clark* very broadly, Kelava argues that if applying it to *any* person or groups would have such an effect, then it cannot be applied even to persons or groups that do not have the same sort of reasonable, settled expectations.

Although *Clark* is a very recent case, the Supreme Court appears reluctant to extend its reach beyond cases involving statutory construction using the constitutional avoidance principle. *See Spector v. Norwegian Cruise Line Ltd.*, 125 S. Ct. 2169, 2182-83 (2005) (plurality opinion) (describing *Clark* as "simply a rule of consistent interpretation of the statutory words"); *id.* at 2187 (Thomas, J., concurring in part) ("Today's decision, then, cabins the *Clark* principle to apply only when the canon of constitutional avoidance is invoked to choose among ambiguous readings of a statute."). We are therefore hesitant to use the broader reading of *Clark* that Kelava advocates to upset settled circuit precedent.

Finally, we note that the Supreme Court recently denied certiorari in *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004), *cert. denied*, 126 S. Ct. 40 (2005). In *Thom*, the Second Circuit, like this circuit, took the position that aliens who did not plead guilty prior to IIRIRA do not have the same settled expectations as the aliens in *St. Cyr*, and therefore do not fall within its parameters. Notwithstanding the vocal dissent,[9] a lukewarm majority opinion,[10] and an apparent circuit split (*see supra* note 7), the Court declined to take the case. Although it is difficult to discern the reasons behind denials of certiorari, if *Clark* really means what Kelava argues, *Thom*

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[9] *Thom*, 369 F.3d at 167-73 (Underhill, J., dissenting).

[10] In *Thom*, Judge Calebresi, writing for the majority, indicated that he personally would agree with the dissent that IIRIRA's repeal of § 212(c) relief should operate prospectively only, but found himself precluded by prior Second Circuit authority from reaching such a conclusion. 369 F.3d at 163 n.6.

would have been an excellent vehicle to clarify that *Clark*'s analysis applies in the retroactivity context. At a minimum, the Court has not clearly rejected the position that we and the Second Circuit have taken.

A three-judge panel cannot disregard prior circuit precedent unless it has been effectively overruled by an intervening Supreme Court decision. *See Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc). While the intervening decision need not involve an identical issue, its implications do need to be sufficiently discernable so that the two cases are "clearly irreconcilable." *Id.* at 900. We do not believe the test is met in this case because, as described above, *Clark* is distinguishable, its application has apparently been limited by the Supreme Court itself, and the Supreme Court—by denying certiorari in *Thom*—declined to interfere with this circuit's analysis. Although Kelava's argument is interesting, in the end we remain bound by existing circuit precedent. Therefore, consistent with *Armendariz-Montoya*'s rationale, we hold there is no retroactive effect in applying the IIRIRA elimination of § 212(c) relief to Kelava, who quite clearly engaged in the requisite terrorist activity prior to IIRIRA's enactment.[11]

PETITION DENIED.

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[11] Because of our holding, we need not reach the government's argument that even in 1978 and at the time of Kelava's plea in 1980, his activities rendered him ineligible for § 212(c) relief. Under the law that existed at that time, § 212(c) relief was not available to aliens who "advocate or teach or who are members of or affiliated with any organization that advocates or teaches ... (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized Government because of his or their official character." 8 U.S.C. § 1182(a)(28)(F)(ii) (1976).

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

In re: BOZO KELAVA

File: A18 715 040 - Tuscon
Date: [STAMPED] September 30, 2003

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael Aaron Harwin, Esquire

ON BEHALF OF DHS: Daniel H. Ragsdale
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony

Lodged Sec. 237(a)(4)(B), I&N Act [8 U.S.C. § 1227(a)(4)(B)] -
Terrorist activity

APPLICATION: Cancellation of removal under section 240A; termination of proceedings; waiver of inadmissibility under section 212(c)

The respondent, a native and citizen of Croatia, appeals

from an Immigration Judge's denial of his motion to terminate proceedings and his determination that the respondent is removable as charged. The appeal will be dismissed.[1]

The respondent sets forth several arguments on appeal. First, the respondent renews his argument that his 1981 conviction for imprisoning a foreign official in violation of 18 U.S.C. § 112(a) falls within the "purely political offense" of section 101(a)(43)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(F). Next, the respondent argues that he is eligible for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a), because the aggravated felony charge can be waived under section 212(c) of the Act, 8 U.S.C. § 1182(c), and that he is not otherwise ineligible for cancellation because the terrorist activity charge under section 237(a)(4)(B) of the Act, 8 U.S.C. § 1227(a)(4)(B), should not apply retroactively to his 1981 conviction. *See* section 240A(c)(4) of the Act (making aliens inadmissible under section 212(a)(3) or deportable under section 237(a)(4) ineligible for cancellation of removal). The respondent also argues that his due process rights were violated due to the Department of Homeland Security's (the "DHS," formerly the Immigration and Naturalization Service) initiation of proceedings almost 20 years after his conviction. Finally, the respondent argues that the Immigration Judge abused his discretion in not granting the respondent's motion to terminate removal proceedings pursuant to then-existing subsection (f) of 8 C.F.R. § 239.2 (2002), *but see* 68 Fed.Reg. 35276 (June 13, 2003) (omitting subsection (f) from 8 C.F.R. § 1239.2 (2003)).

We will first address the issue of the DHS's decision to initiate proceedings in 1999. "The determination of whether and when to institute proceedings in individual cases is within

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[1] The respondent's request for oral argument is denied. 8 C.F.R. § 1003.1(e)(7) (2003).

the sole province of the [DHS], and its decisions in this regard are not reviewable by either the immigration judge or this Board." *Matter of Ramirez-Somera*, 20 I&N Dec. 564 (BIA 1992); *see also Matter of U-M-*, 20 I&N Dec. 327 (BIA 1991); *Matter of Torres*, 19 I&N Dec. 371 (BIA 1986); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Geronimo*, 13 I&N Dec. 680 (BIA 1971).

We now turn to the charges of removability. We find that the respondent is removable and ineligible for any forms of relief under section 237(a)(4)(B) of the Act. The respondent argues that this charge should not apply retroactively to his conviction because "terrorist activity" was not a ground for exclusion or deportation in 1981.[2] We disagree.

In *Matter of Chow*, 20 I&N Dec. 647 (BIA 1993), we decided the same retroactivity issue with respect to the then-new statutory provision for convictions for certain firearms offenses enacted by IMMACT. In *Chow*, *supra*, we held that the new firearms offense provision did apply retroactively based on the very language of the statute, "at any time after entry", and the lack of any restriction regarding the dates on which a conviction must occur in order to be included within the scope of the new statute. We also found that the only restriction on the new provision was that it was only applicable to proceedings for which notice was provided to the alien on or after March 1, 1991. *Chow*, *supra*; *see* section

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[2] This ground for deportation was enacted in 1990 pursuant to section 602(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5082 (enacted Nov. 29, 1990) ("IMMACT") and codified at 8 U.S.C. § 1231(a)(4)(B) (1991). The original language of the section stated "Any alien who has engaged, is engaged, or at any time after *entry* has engaged in any terrorist activity (as defined in section 212(a)(3)(B)(iii)) is deportable." Emphasis added. The word "entry" was replaced with the word "admission" by section 308(f)(1)(N) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (enacted Sep. 30, 1996) ("IIRIRA"). IIRIRA also redesignated this section as 237(a)(4)(B). Section 308(a) of IIRIRA.

602(d) of IMMACT. This case presents all of the factors that existed in *Chow*, *supra*. By its very language the terrorist activity provision of IMMACT applied to any alien who engaged in terrorist activity "any time after entry". Likewise, the only date restriction on this provision appears in section 602(d) of IMMACT, which makes the provision applicable to proceedings for which notice was provided to the alien on or after March 1, 1991. Accordingly, we find that the charge of removability for terrorist activity pursuant to section 237(a)(4)(B) of the Act applies to the respondent's 1981 conviction. Moreover, we affirm the Immigration Judge's finding that the respondent is removable pursuant to section 237(a)(4)(B) of the Act. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). Because we find that the respondent is removable pursuant to section 237(a)(4)(B) of the Act, we need not address the aggravated felony charge.

As to the respondent's applications for relief, he remains ineligible for a wavier of inadmissibility under section 212(c) of the Act and cancellation of removal. Section 212(c) of the Act (1991) (excluding terrorist activity from section 212(c) eligibility); *see also* section 601(d) of IMMACT, section 240A(c)(4) of the Act.

Finally, we address the respondent's motion to terminate proceedings pursuant to 8 C.F.R. § 239.2 (2002). There is no evidence on the record the respondent had a pending application for naturalization at the time of his removal hearing. *Id.* Moreover, due to the terrorist activity charge, the respondent cannot establish prima facie eligibility for naturalization. *Id.* Accordingly, the Immigration Judge did not abuse his discretion in denying this motion.

Based on the foregoing, the respondent is removable under

section 237(a)(4)(B) and is ineligible for any forms of relief. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ Frederick D. Hess
FOR THE BOARD

APPENDIX C

IMMIGRATION COURT

160 N. STONE AVENUE, SUITE 300

TUCSON, AZ 85701

In the Matter of
KELAVA, BOZO
Respondent

Case No. A18-715-040

IN [CIRCLED] REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Jan 30, 2002. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to CROATIA or in the alternative to CROATIA.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to CROATIA or in the alternative to CROATIA.

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $_____ with an alternate order of removal to [CIRCLED] CROATIA.

[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal

was ( ) granted under section 240A(b)(1)
( ) granted under section 240A(b)(2) ( ) denied
( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent status was rescinded under section 246.

[ ] Respondent's is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation of the discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other: _____.

Date: Jan 30, 2002
Appeal: Waived / [CIRCLED] Reserved
Appeal Date By: Mar 1, 2002
[HANDWRITTEN] March 1, 2002

/S/
RICHARD H. KNUCK
Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL
[CIRCLED] (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer
[X] ALIEN's ATT/REP [X] INS
DATE: _____ BY: COURT STAFF _____
Attachments: [ ] EDIR-33 [ ] EDIR-28 [ ] Legal Services List [ ] Other

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
160 North Stone Avenue, Suite 300
Tucson, Arizona 85701

IN THE MATTER OF:	)	**In Removal Proceedings**
	)	**Motion to Terminate**
KELAVA, Bozo	)	
	)	File No.: A18 715 040
Respondent	)	Date: October 1, 2001

On Behalf of Respondent:	**On Behalf of Service:**
Michael Aaron Harwin, Esq. 36 W. Franklin Street Tucson, AZ 85701	Daniel H. Ragsdale, Esq. Assistant District Counsel U.S. I.N.S. 2035 N. Central Ave. Phoenix, AZ 85004

DECISION OF THE IMMIGRATION JUDGE

I. **Procedural History**

The respondent is a male alien, native and citizen of Croatia, who was admitted to the United States at New York, New York, on or about September 4, 1969, as a refugee. His status was adjusted to that of a lawful permanent resident on March 22, 1972. On January 14, 1980, he was convicted in the United States District Court for the Northern District of Illinois Eastern Division, for the offense of imprisonment of a foreign official, to wit: a crime of violence, in violation of 18 United States Code (U.S.C.) § 112(a). For that offense, the respondent was sentenced to a term of imprisonment of two years and six months.

Based on the foregoing, on May 18, 1999, the Immigration and Naturalization Service (Service) served a Notice to Appear on the respondent charging with removability pursuant to § 237(a)(2)(A)(iii) of the Act, as amended, in that, any time after admission, he has been convicted of an aggravated felony as defined in § 101(a)(43) of the Act, a crime of violence (as defined in section 16 of Title 18, United States Code, but not including a purely political offense) for which the term of imprisonment ordered is at least one year. See Exhibit 1. On June 21, 2000, the Service filed an additional charge of removability against the respondent under § 237(a)(4)(B) as an individual who has engaged, is engaged, or at any time after admission engaged in terrorist activity (as defined in § 212(a)(3)(B)(iii). See Exhibit 5.

Venue originated in Florence, Arizona. On July 8, 1999, the respondent was released from the custody of the Service, and venue was changed to San Francisco, California, where the respondent resides.

At a Master Calendar held on November 2, 1999, in San Francisco, California, the respondent requested that venue be changed to Tucson, Arizona, where his *pro bono* counsel resided. The Court obliged, and venue was changed to Tucson, Arizona.

At a Master Calendar Hearing in Tucson, Arizona, the following items were marked as exhibits and admitted into evidence: Form I-862, Notice to Appear (Exhibit 1); Form I-261, Additional Charges of Deportability/Inadmissibility (Exhibit 2); Form I-181, Memorandum of Creation of Record of Lawful Permanent Residence (Exhibit 3); Second Form I-261, Additional Charges of Deportability/Inadmissibility (Exhibit 4); Third Form I-26 1, Additional Charges of Deportability/Inadmissibility (Exhibit 5). The Court requested that the parties submit briefs regarding the charges of removability.

On October 3, 2000, the respondent filed a Motion to

Terminate Proceedings with the Court. On January 31, 2001, the Service filed a response brief with the Court.

II. Arguments of the Parties

A. Respondent's Argument

The respondent asserts that his conviction for imprisonment of a foreign official falls within the purely political exception to the crime of violence, aggravated felony charge. In so doing, he cites the language of § 101(a)(43) of the Act, which states that the term aggravated felony "applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years." The respondent asserts that the plain meaning of § 101 (a)(43) of the Act "makes the definition of aggravated felony, including the purely political offense exception, applicable to all domestic and foreign conviction." Resp Motion at 5. Therefore, the clear statutory language must be given effect, and the political offense exception must apply to the respondent's domestic crime.

The respondent further asserts that the legislative history of § 101 (a)(43) of the Act demonstrates that Congress has long intended the provisions of that section to apply to both foreign and domestic convictions. Id. Moreover, the respondent argues, foregoing conclusion is further supported by the principal of statutory interpretation mandating that ambiguities in deportation statutes be continued in the favor

of the alien. Id. at 4.[1]

B. Service's Argument

In its response brief, the Service argues that the respondent's conviction for imprisonment of a foreign official constitutes a crime of violence pursuant to § 101(a)(43)(F). In its analysis, the Service maintains that 18 U.S.C. § 112(a), the statute under which the respondent was convicted, is a divisible statute. Therefore, it is necessary to look to the record of conviction to determine whether or not the respondent's conviction is a crime of violence. In so doing, it asserts, it is clear that the can be characterized as a crime of violence under both 18 U.S.C. §§ 16(a)[2] and (b).[3]

It further argues that the purely political offense exception to the crime of violence charge is inapplicable in this case. Serv. Brief at 10. In so maintaining, the Service asserts that the political exception contained in §101 (a)(43)(F) was borrowed from the law governing extradition. A review of that law reveals that the crimes must have been committed outside the United States. Furthermore, the Service cites legislative history and applicable case law in support of its conclusion. Id. at 12.

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[1] The respondent also contends that the Service's delay in filing a charging document against him violates due process; that the respondent remains eligible for cancellation of removal and a § 212(c) waiver; and that the Court should terminate proceedings to allow the respondent to file for naturalization. While the Court acknowledges these arguments, it will not consider them in the instant decision which shall solely address removability.

[2] The Service asserts that the offense contains an element of physical force as imprisonment assumes force will be used. Serv. Brief 8.

[3] The Service maintains that since respondent and his accomplice imprisoned a foreign official while using a deadly weapon, the crime was one that involved a substantial risk of physical force against another, and thus, is a crime of violence.

The Service further contends that the respondent is removable as an individual who has engaged in terrorist acts, pursuant to § 237(a)(4)(B). He imprisoned a foreign official to force the West German government to release a Croatian prisoner. Such action, according to the Service, constitutes terrorist activity within the meaning of section II[4] and III[5] of § 212(a)(3)(B)(V)(ii). Therefore, proceedings should not be terminated.

III. Applicable Law

In a removal proceeding, the Service has the burden of proving by clear and convincing evidence that an alien who has been admitted to the United States is deportable as charged. See § 240(c)(3) of the Act. In the instant case, the Service alleges and has the burden of proving that the respondent's convictions pursuant to 18 U.S.C. § 112(a) render him removable under § 237(a)(2)(A)(iii) of the Act, as an aggravated felon convicted of a crime of violence and § 237(a)(4)(B) of the Act as an individual who has engaged, is engaged, or at any time after admission engaged in terrorist activity.

IV. Aggravated Felony Charge

A. Applicable Law

Section 237(a)(2)(A)(iii) of the Act deems any alien who is convicted of an aggravated felony at any time after admission

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[4] Seizing or detaining, and threatening to kill, injure, or continue to detain another individual in order to compel a third person to do or abstain from doing any act an explicit or implicit condition for the release of the individual seized or detained.

[5] A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18, United States Code) or upon the liberty of such person.

deportable. An aggravated felony is defined in § 101(a)(43) of the Act. A crime of violence is deemed to constitute an aggravated felony: "the term 'aggravated felony' means ... (F) a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of imprisonment) is at least 1 year." § 101(a)(43) and (F) of the Act.

In turn, a crime of violence for purposes of the Act is defined as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (1999).

The Board of Immigration Appeals (Board) held that an offense meets the definition of a crime of violence under 18 U.S.C. § 16(a), for purposes of determining whether it is an aggravated felony as defined in §101(a)(43)(F) of the Act, if the offense has as an element the use, attempted use, or threatened use of physical force against the person or property of another. Matter of Alcantar, 20 I&N Dec. 801 (BIA 1994). The Board deemed an offense a crime of violence under 18 U.S.C. §16 (b), for the purposes of determining if it is an aggravated felony as defined in § 101(a)(43) of the Act, if the offense is a felony, and the nature of the crime as elucidated by the generic elements of the offense is such that the commission would ordinarily present a risk that physical force would be used against the person or property of another irrespective of whether the risk develops or harm actually occurs. Id. at 812. Such an offense does not require the specific intent to do violence, rather it requires only a

minimum reckless behavior which by its nature involves a substantial risk of physical force against the person or property of another. Id. at 813. Force must be a destructive or violent force, more than merely removing the property of another. Rodriguez-Guzman v. INS, 56 F.3d 18 (5th Cir. 1995) Accordingly, convictions for involuntary manslaughter, Matter of Alcantar, supra, statutory rape, Matter of B-, 21 I&N Dec. 287 (BIA 1996), and aggravated driving under the influence, Matter of Magallanes, Interim Decision 3341 (BIA 1998), have been deemed crimes of violence under 18 U.S.C. § 16(b) while a conviction for criminally negligent homicide has been found not to constitute a crime of violence when *there is no risk that physical force will be used in the commission of the offense.* Matter of Sweetser, Interim Decision 3390 (BIA 1999)(emphasis added).

The state statute under which the respondent was convicted, 18 U.S.C. § 112(a), provides:

> Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent attack upon the person or liberty of such person, or, if likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodations, or means of transport or attempts to commit any of the foregoing shall be fined under this title or imprisoned not more than three years, or both. Whoever in the commission of such act uses a deadly or dangerous weapon, or inflicts bodily injury, shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 112(a) (2000). The term "foreign official," in turn, is defined as:

> (A)A Chief of State or the political equivalent, President, Vice President, Prime Minister, Ambassador, Foreign Minister, or other officer of Cabinet rank or above of a

> foreign government or the chief executive officer of an international organization, or any person who has previously served in such capacity, and any member of his family, while in the United States; and (B) any person of a foreign nationality who is duly notified to the United States as an officer or employee of a foreign government or international organization, and who is in the United States on official business, and any member of his family whose presence in the United States is in connection with the presence of such officer or employee.

18 U.S.C. § 1116(b)(3) (2000).

B. Analysis of the Respondent's Conviction

1. Application of 18 U.S.C. § 16(a)

The definition of imprisonment of a foreign official as contained in 18 U.S.C. § 13-112(a) does not include as an element the use, attempted use, or threatened use of physical force against the person or property of another. Accordingly, the respondent's conviction cannot be deemed a crime of violence as articulated in 18 U.S.C. § 16(a). See Matter of Sweetser, supra. Thus, it must be determined whether his conviction can be deemed a crime of violence pursuant to 18 U.S.C. § 16(b).

2. Application of 18 U.S.C. § 16(b)

To be convicted of the offense of imprisonment of a foreign official, an individual must be "assault, strike, wound, imprison, or offer violence to a foreign official ... or make any other violent attack upon the person or liberty of such person, or ... make a violent attack upon his official premises." 18 U.S. C. § 112(a). "substantial and unjustifiable risk" that a proscribed result will occur. A.R.S. § 13-105.

An examination of the plain language of 18 U.S.C. § 112(a) indicates that the crime of imprisonment of a foreign official

is one of violence. The acts of assaulting, wounding, imprisoning, offering violence, or making a violent attack upon a person or his or her premises all involve "a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." When one assaults, wounds, imprisons, offers violence, or makes a violent attack upon another individual, there is an inherent risk that physical force will be used against the victim. Similarly, when one engages in any of the foregoing acts, there is a risk that physical force will be used against another's property. It is evident, therefore, that the respondent's offense is one of violence within the meaning of 18 U.S.C. § 16(b).

Since the respondent's offense of imprisonment of a foreign official is a felony under federal law and involves a substantial risk of physical force against the person or property of another, it can be properly characterized as a crime of violence under 18 U.S.C. § 16(b). The respondent was sentenced to two and one half years imprisonment for this offense. Therefore, the crime can also be deemed an aggravated felony under § 101(a)(43)(F), as a crime of violence for which the term of imprisonment imposed (regardless of any suspension of imprisonment) is at least 1 year. The Court notes that the respondent does not appear to contest this fact.

C. Political Offense Exception

The respondent asserts that while his crime is one of violence, it falls within the purely political offense exception contained in § 101(a)(43)(F) of the Act. The Court disagrees with this assertion for the following reasons.

First, examination of applicable case law indicates that crimes must have been committed abroad and must have been part of a concerted action to qualify for the purely political exception. The Board of Immigration Appeals (BIA) held that an alien convicted of fraud in Nazi Germany should not

be deemed excludable for a crime involving moral turpitude when the conviction occurred primarily because of the alien's political considerations: the fact that he was Jewish. Matter of B, 1 I&N Dec. 47, 50 (BIA 1941). Similarly, in Matter of K, 4 I&N Dec. 108, 118 (INS Central Office, 1950), it was determined that an alien's Polish conviction for voluntary manslaughter did not constitute a purely political offense since the alien independently assassinated a Soviet Official and was not acting in tandem with a political group.

Second, the term "purely political offense" is also contained in § 212(a)(2)(A)(i)(I) and § 212(a)(2)(B) of the Act. Examination of crimes deemed "purely political offenses" under these sections similarly indicate that *only foreign* convictions can be excepted.[6] In light of the Whole Act Rule, the long-standing rule of statutory interpretation stating that identical words used in different parts of the same act are intended to have the same meaning, the Court is further compelled to find that the term "purely political offenses" refers only to foreign crimes. See e.g. Gustafson v. Alloyd Company Inc., 513 U.S. 561 (1995).

Finally, legislative history concerning the exception to the grounds of inadmissibility also reveals that the exception applies only to foreign convictions. In determining that excludability/inadmissibility should not be premised on purely political offenses, Congress recognized that many aliens were unfairly and disproportionately convicted and punished by their national government due to their

---

[6] See 9 FAM § 40.21(a) n.10 (stating that the following offenses are purely political: alien convicted by a Netherlands Court of having executed false rations coupons to benefit the underground during World War II; alien who was a member of the German SS and was convicted by the Soviets to nine years' imprisonment for theft of paper bags; alien convicted of South African Court of robbery and assault when he overpowered guards in an attempt to escape from a civilian internment camp).

membership in racial, political, or religious minorities.[7] Not wishing to exclude such individuals from the United States, Congress created an exception to certain grounds of excludability/inadmissibility, deeming individuals who were convicted of political offenses by a foreign government admissible to this country. No such similar exception was made for political offenses committed in this country.[8]

V. Terrorist Activity Charge

The respondent was further charged with removability under § 237(a)(4)(B) as one who engaged in a terrorist activity. Section 212(a)(3XB)(iii) defines engagement in terrorist activity as:

> As used in this Act, the term "engage in terrorist activity" means to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time, including any of the following acts:
> (I) The preparation or planning of a terrorist activity.
> (II) The gathering of information on potential targets for terrorist activity.
> (III) The providing of any type of material support, including a safe house, transportation, communications, funds, false documentation or identification, weapons, explosives, or training, to any individual the actor knows or has reason to believe has committed or plans to commit a terrorist activity.
> (IV) The soliciting of funds or other things of value for

---

[7] H.R. Conf. Rep. No. 2096, 82nd Cong., 2nd Sess. 127 (1952).

[8] The Court believes that domestic offenses were not exempted because the political exception is not necessary in a land of peace. Instead, it only applies to offenses which occurred in a country plagued by war or a struggle of some sort.

terrorist activity or for any terrorist organization. (V) The solicitation of any individual for membership in a terrorist organization, terrorist government, or to engage in a terrorist activity.

In turn, the term "terrorist activity" is defined at section § 212(a)(3)(B)(ii) as:

(ii) Terrorist activity defined.-As used in this Act, the term "terrorist activity" means any Activity which is unlawful under the laws of the place where it is committed (or which, if Committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following: (I) The highjacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle). (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.
(IV) An assassination.
(V) The use of any-

(a) biological agent, chemical agent, or nuclear weapon or device, or
(b) explosive or firearm (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.

When applying the foregoing definitions to the

circumstances of the respondent's offense, of imprisonment of a foreign official, discussed *infra*, it is clear that the respondent's actions constituted engagement in terrorist activity within the meaning of § 212(a)(3)(B)(iii) of the Act.

The FBI report discussing the respondent's offense indicates that at 9:40 a.m. on April 17, 1978, the respondent and another individual, both armed, seized the Consular Officer of the Federal Republic of Germany and took eight hostages. See Attachment to Service's Brief. Seven of the hostages were employees of the Consulate, and one was a visiting German national. Id. The respondent and his cohort demanded to be placed in telephonic contact with a prisoner incarcerated in Cologne, Germany. Id. They then demanded that this particular prisoner either be released or not be extradited to Yugoslavia. Id. They detained six hostages for nine hours and refused to negotiate with either the FBI or the Chicago police. Id. Eventually, the respondent and his cohort were allowed to communicate with the prisoner who urged them to peacefully surrender to the authorities. Id. At 8:00 p.m., the respondent and his accomplice surrendered. Id.

In light of the foregoing, the Court finds that the crime of imprisonment of a foreign official is a terrorist activity under § 212(a)(3)(B)(V)(ii)(II) of the Act, the seizing or detaining, and threatening to kill, injure, or continue to detain another individual in order to compel a third person to do or abstain from doing any act an explicit or implicit condition for the release of the individual seized or detained.

The Court further finds that respondent's offense can be characterized as terrorist activity under § 212(a)(3)(B)(V)(ii)(II) of the Act, a violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person. The record of conviction establishes that one of the individuals held hostage by the respondent was Werner Ickstadt, an internationally protected person, as defined in 18 U.S.C. § 1116(b)(4). Accordingly, the charge

of removability under § 237(a)(4)(B) of the Act shall be sustained.

VI. **Conclusion**

On the basis of the foregoing, the Court finds that the respondent is removable under both § 237(a)(2)(A)(iii) and § 237(a)(4)(B) of the Act. Therefore, the Motion to Terminate shall be denied and the October 12, 2001 shall address availability of relief from removal, if any.

Accordingly, the following order is entered:

IT IS ORDERED that the respondent's request for termination of proceedings be **DENIED**.

_____
Richard H. Knuck
U.S. Immigration Judge

CERTIFICATE OF SERVICE

SERVICE BY: Mail (M) Personal Service (P)
To: [ ] INS [ ] Alien [ ] Alien's Attorney
Date: **By**: Court Staff

APPENDIX E

8 U.S.C. § 1182 (1976) provides in relevant part:

(a) General classes

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * *

(28) Aliens who are, or at any time have been, members of any of the following classes:

* * *

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches * * * (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character * * * .

* * *

(c) Nonapplicability of subsections (a)(1) to (25), (30), and (31)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

8 U.S.C. § 1227(a) provides in relevant part:

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(4) Security and related grounds

(B) Terrorist activities

Any alien who has engaged, is engaged, or at any time after admission engages in any terrorist activity (as defined in section 1182(a)(3)(B)(iv) of this title) is deportable.

* * *

8 U.S.C. § 1229b(c) provides in relevant part:

(c) Aliens ineligible for relief

The provisions of subsections (a) and (b)(1) of this section shall not apply to any of the following aliens:

* * *

(4) An alien who is inadmissible under section 1182(a)(3) of this title or deportable under section 1227(a)(4) of this title.

* * *

Section 601 of the Immigration Act of 1990, Pub. L. No. 101-649, tit. VI, 104 Stat. 5075-77, provides in relevant part:

(a) REVISED GROUNDS FOR EXCLUSION.—Subsection (a) of section 212 (8 U.S.C. 1182) is amended to read as follows:

"(a) CLASSES OF EXCLUDABLE ALIENS.—Except as otherwise provided in this Act, the following describes classes of excludable aliens who are ineligible to receive visas

and who shall be excluded from admission into the United States:

* * *

"(3) SECURITY AND RELATED GROUNDS.—

* * *

"(B) TERRORIST ACTIVITIES.—

"(i) IN GENERAL.—Any alien who—

"(I) has engaged in a terrorist activity

* * * is excludable."

* * *

(d) CONFORMING AMENDMENTS TO SECTION 212.—

(1) Subsection (c) of section 212 (8 U.S.C. 1182) is amended by striking "paragraph (1) through (25) and paragraphs (30) and (31) of subsection (a)" and inserting "subsection (a) (other than subparagraphs (A), (B), (C), or (E) of paragraph (3))".

* * *

(e) EFFECTIVE DATE.—(1) Except as provided in paragraph (2), the amendments made by this section and by section 603(a) of this Act shall apply to individuals entering the United States on or after June 1, 1991.

(2) The amendments made by paragraphs (5) and (13) of section 603(a) shall apply to applications for adjustment of status made on or after June 1, 1991.

(2)

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AUG 14 2006
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SUPREME COURT, U.S.

No. 05-1312

In the Supreme Court of the United States

BOZO KELAVA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON MARIE IGOE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the repeal of discretionary relief from deportation under former 8 U.S.C. 1182(c) (1994) for aliens who have engaged in terrorist activity applies to an alien whose terrorist activity predated the repeal.

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In the Supreme Court of the United States

No. 05-1312

BOZO KELAVA, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-11a) is reported at 434 F.3d 1120. The order of the Board of Immigration Appeals (Pet. App. 12a-16a) and the decision of the immigration judge (Pet. App. 20a-33a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2006. A petition for rehearing was denied on January 12, 2006 (Pet. App. 2a). The petition for a writ of certiorari was filed on April 12, 2006. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed

Supp. II 1996), authorized a permanent resident alien with "a lawful unrelinquished domicile of seven consecutive years" to apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). In the Immigration Act of 1990 (IMMACT), Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien who has engaged in "terrorist activities." Pub. L. No. 101-649, §§ 601(a), 601(d)(1), 104 Stat. 5067, 5075-5076; see 8 U.S.C. 1182(a)(3)(B) (Supp. II 1990); 8 U.S.C. 1182(c) (Supp. II 1990). In 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a new form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by IMMACT, Section 240A precludes from eligibility for discretionary relief any alien who has engaged in terrorist activity. See 8 U.S.C. 1227(a)(4)(B) (2000 & Supp. IV 2004); 8 U.S.C. 1229b(c)(4).[1]

IIRIRA also precluded from eligibility for discretionary relief from removal any alien convicted of an aggravated felony. See 8 U.S.C. 1229b(a)(3). In *INS* v. *St. Cyr*, *supra*, this Court held, based on principles of nonretroactivity, that IIRIRA's repeal of discretionary relief for aggravated felons should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement if, at the time of the plea

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[1] "Terrorist activity" is defined as "[t]he seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person * * * to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained." 8 U.S.C. 1182(a)(3)(B)(ii)(II).

agreement, the conviction would not have rendered the alien ineligible for discretionary relief. 533 U.S. at 314-326.

2. In 1969, petitioner, an anti-communist dissident, came to the United States as a refugee from the Croatian region of the former Yugoslavia. In 1972, petitioner became a lawful permanent resident. Pet. App. 2a.

In the late 1970s, the Federal Republic of Germany began deporting and extraditing Croatian dissidents to Yugoslavia, where they allegedly were tortured and executed. In April 1978, petitioner and an accomplice, armed with handguns, ropes, and a phony bomb, entered the West German Consulate in Chicago, seized several employees, and demanded that West Germany decline to extradite Stepan Bilandzic, a prominent Croatian dissident, to Yugoslavia. Petitioner and his accomplice later released the hostages after being permitted to speak with Bilandzic. Pet. App. 2a-3a.

Petitioner and his accomplice were indicted and convicted in federal court of conspiracy and kidnapping of foreign officials. The district court, however, ordered a new trial on the basis that it had erred in instructing the jury. After the government obtained a new indictment charging petitioner and his accomplice with armed imprisonment, the United States Court of Appeals for the Seventh Circuit determined that the defendants could be retried only for simple (unarmed) imprisonment, the lesser included offense of the original kidnapping charge. In January 1980, petitioner pleaded guilty to one count of unarmed imprisonment of a foreign national, and was sentenced to two and one-half years in prison. Pet. App. 3a.

3. In May 1999, the government charged petitioner with being removable based on his having been convicted of an aggravated felony, see 8 U.S.C. 1227(a)(2)(A)(iii). In June 2000, the government amended its charge to allege that petitioner was also (and independently) removable based on his having engaged in terrorist activity, see 8 U.S.C. 1227(a)(4)(B). Pet. App. 3a, 21a.

The immigration judge (IJ) determined that petitioner was removable both because he had been convicted of an aggravated felony and because he had engaged in terrorist activity. Pet. App. 17a-33a. The IJ also found that petitioner was ineligible for discretionary relief under former Section 212(c). Pet. App. 3a-4a.

The Board of Immigration Appeals (Board) dismissed petitioner's appeal, concluding that petitioner was removable because he had engaged in terrorist activity and that he was ineligible for discretionary relief under former Section 212(c). Pet. App. 12a-16a. Because the Board found that petitioner was removable for having engaged in terrorist activity, the Board did not address whether petitioner was also removable based on his conviction of an aggravated felony. *Id.* at 15a.

4. Petitioner filed a petition for review in the court of appeals, which the court denied. Pet. App. 1a-11a. Petitioner, relying on principles of non-retroactivity as applied in *INS* v. *St. Cyr*, *supra*, argued that, because he had pleaded guilty to unarmed imprisonment in 1980 at a time when his conviction did not render him ineligible for discretionary relief, IIRIRA's subsequent repeal of discretionary relief for aliens who have engaged in terrorist activity should be construed not to apply to him. The court of appeals rejected petitioner's argument, concluding that the repeal of discretionary relief had no

retroactive effect in petitioner's circumstances. Pet. App. 5a-11a.

The court explained that petitioner's circumstances differed materially from those at issue in *St. Cyr*. In *St. Cyr*, because the relevant statute precluded discretionary relief for any alien convicted of an aggravated felony, a "guilty plea supplied the conviction necessary for removal." Pet. App. 7a. Petitioner's ineligibility for discretionary relief, by contrast, "does not hinge on a 'conviction,'" because his ineligibility results from his having "engaged in" terrorist activity, not on his having been "convicted of" engaging in terrorist activity. *Ibid.* (citing 8 U.S.C. 1227(a)(4)(B)). The court explained that petitioner thus "is undisputedly removable based on his actions in 1978, regardless of his later decision to plead guilty." *Ibid.*

The court reasoned that *St. Cyr* therefore did not assist petitioner. That decision, the court explained, was grounded in the belief that an alien's decision to plead guilty to an aggravated felony before IIRIRA would have been made in "reliance on existing law," under which conviction of an aggravated felony did not categorically render the alien ineligible for discretionary relief. Pet. App. 7a; see *St. Cyr*, 533 U.S. at 325 (observing that aliens "almost certainly relied upon th[e] likelihood [of receiving Section 212(c) relief] in deciding whether to forgo their right to a trial"). By contrast, petitioner, "in order to demonstrate reliance or any sort of 'settled expectations' on the existing immigration laws," would be required "to assert that he would not have committed the terrorist activity in 1978 if he had known that he might become ineligible for discretionary relief from removal." Pet. App. 8a. The court dismissed any such assertion, relying on its own decisions and deci-

sions of other courts of appeals that had "pointed out the absurdity of arguing that one would not have committed a crime in the first place * * * if he had known he could not [then] ask for" discretionary relief. *Ibid.*[2]

Finally, the court rejected petitioner's reliance on *Clark* v. *Martinez*, 543 U.S. 371 (2005). The court observed that, in *Clark*, this Court held that the interpretation of 8 U.S.C. 1231(a)(6) adopted in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), with respect to one group of aliens addressed by that provision, also governed the interpretation of the provision with respect to another groups of aliens addressed by it. The court of appeals reasoned that the "retroactivity analysis employed in *St. Cyr* [is] a different animal" from the question of statutory interpretation at issue in *Clark*, because "applying a new provision may have a precluded retroactive effect as to one group but not to another." Pet. App. 9a. The court therefore concluded that the repeal of former Section 212(c) may have a retroactive effect in the case of certain aliens and thus be construed not to apply to those aliens, but have no retroactive effect in the case of other aliens, like petitioner, who lack "the same sort of reasonable, settled expectations." *Id.* at 10a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review therefore is unwarranted.

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[2] Because the court concluded that applying IIRIRA's repeal of discretionary relief to petitioner had no retroactive effect, the court found no need to consider the applicability to petitioner of IMMACT's previous elimination of Section 212(c) relief for aliens who have engaged in terrorist activity (see p. 2, *supra*). Pet. App. 7a n.6.

1. The court of appeals correctly concluded that IIRIRA's repeal of discretionary relief for aliens who have engaged in terrorist activity applies to an alien whose terrorist activity predated IIRIRA, and that petitioner therefore is ineligible for discretionary relief. This Court has established that the "inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)); see *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2428 (2006). The analysis "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin*, 527 U.S. at 358 (quoting *Landgraf*, 511 U.S. at 270).

The Court applied those principles in *St. Cyr*. There, the Court addressed the situation of aliens who pleaded guilty after Section 212(c) was amended in 1990 to render ineligible any alien convicted of an aggravated felony who had served a prison term of at least five years. A plea agreement providing for a sentence of less than five years thus would have assured the alien's eligibility for relief under the amended provision. See 533 U.S. at 293, 321-324. The Court observed that "preserving the possibility of [discretionary] relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial," *id.* at 323, and that aliens who pleaded guilty "almost certainly relied upon [the] likelihood of" obtaining such relief "in deciding whether to forgo their right to a trial," *id.* at 325. In those circumstances in which the prosecutor received the benefit of a plea agreement that

was likely facilitated by the alien's belief that he would be eligible for Section 212(c) relief, the Court concluded that considerations of fair notice, reasonable reliance, and settled expectations indicated that the repeal of Section 212(c) had a retroactive effect. *Id.* at 323-324.

St. Cyr thus was grounded in the notion that, because aliens would have based their decision to plead guilty on the continued availability of discretionary relief, the plea of guilty gave rise to reasonable reliance interests and expectations in preserving eligibility for that relief. The "possible discretionary relief," in short, was "a focus of expectation and reliance" in the decision to plead guilty as part of a "*quid pro quo* agreement". *Fernandez-Vargas*, 126 S. Ct. at 2432 & n.10 (citing *St. Cyr*, 533 U.S. at 323).

As the court of appeals explained, Pet. App. 5a-8a, neither *St. Cyr* nor the controlling "considerations of fair notice, reasonable reliance, and settled expectations," *Martin*, 527 U.S. at 358 (quoting *Landgraf*, 511 U.S. at 270), suggest that IIRIRA's elimination of discretionary relief for aliens who have engaged in terrorist activity has a retroactive effect in the case of an alien whose terrorist activity predated IIRIRA. Whereas the Court in *St. Cyr* concluded that aliens would have relied on the availability of discretionary relief in deciding to plead guilty to an aggravated felony, there is no basis for supposing that an alien's decision to engage in terrorist activity could have been made in reliance on the availability of discretionary relief, or that such an alien could be considered to have settled expectations in the availability of discretionary relief. See Pet. App. 7a-8a.

Indeed, the courts of appeals have uniformly rejected the notion that IIRIRA's repeal of discretionary relief for aggravated felons could raise retroactivity concerns

merely because an alien *committed* (as opposed to pleaded guilty to) an aggravated felony before IIRIRA. See *Hernandez-Castillo* v. *Moore*, 436 F.3d 516, 519-520 (5th Cir. 2006), petition for cert. pending, No. 05-1251 (filed Mar. 28, 2006); *Evangelista* v. *Ashcroft*, 359 F.3d 145, 154-156 (2d Cir. 2004), cert. denied, 543 U.S. 1145 (2005); *Montenegro* v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002). See also *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam) (reaching that conclusion with respect to limitations on availability of discretionary relief for aggravated felons enacted by Antiterrorism and Effective Death Penalty Act of 1996, § 440(d), 110 Stat. 1277), cert. denied, 539 U.S. 926 (2003); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121 (9th Cir. 2002) (same), cert. denied, 539 U.S. 902 (2003); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998) (same), cert. denied, 528 U.S. 1153 (2000). Those courts have reasoned that "it would border on the absurd to suppose that an alien might have been deterred from committing a crime had he known that, in addition to the prospect of imprisonment and deportation following release, he could not ask for discretionary relief from deportation." *Khan* v. *Ashcroft*, 352 F.3d 521, 524 (2d Cir. 2003) (alteration, citation, and internal quotation marks omitted); see *LaGuerre*, 164 F.3d at 1041. The same conclusion follows in this case with respect to petitioner's contention that applying IIRIRA's elimination of discretionary relief for aliens who have engaged in terrorist activity would have a retroactive effect in the case of an alien who engaged in such activity before IIRIRA.

2. There is no merit to petitioner's contention (Pet. 10-16) that the court of appeals' decision conflicts with *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004), and

Ponnapula v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004). *Olatunji* did not address the repeal of eligibility for discretionary relief for aliens who have engaged in terrorist activity, or address more generally any issues concerning elimination of eligibility for discretionary relief from removal. The case instead addressed a separate provision enacted by IIRIRA, codified at 8 U.S.C. 1101(a)(13)(C)(v), that provides that a lawful permanent resident who travels outside the United States will not be regarded as seeking admission upon his return unless he has been convicted of certain qualifying crimes. The Fourth Circuit held that that provision has a retroactive effect as applied to an alien who had pleaded guilty to a qualifying crime before IIRIRA. 387 F.3d at 388-398. The court reached that conclusion on the basis that the provision had "attached new legal consequences to [the alien's] decision to plead guilty." *Id.* at 396. In this case, by contrast, petitioner's ineligibility for discretionary relief does not result from his "decision to plead guilty," but instead results from his having previously engaged in terrorist activity. See pp. 8-9, *supra*. That distinction, as the court of appeals correctly explained, is pivotal. See Pet. App. 7a-8a.

In *Ponnapula*, the Third Circuit considered whether IIRIRA's elimination of discretionary relief for aggravated felons is retroactive as applied to an alien who was tried and found guilty of an aggravated felony before IIRIRA. The court concluded that *St. Cyr*'s holding concerning aliens who pleaded guilty to an aggravated felony before IIRIRA also applied to aliens "who affirmatively turned down a plea agreement" and went to trial. 373 F.3d at 494. The court reasoned that such aliens "had a reliance interest in the potential availability of [discretionary] relief" because eligibility for relief

"would so obviously factor into [their] decision-making" in electing to go to trial. *Ibid.* That holding has no relevance here for essentially the same reason that the Fourth Circuit's decision in *Olatunji* fails to assist petitioner: Petitioner's ineligibility for discretionary relief does not result from his conviction for engaging in terrorist activity, but instead results from his having engaged in such activity.

Petitioner asserts (Pet. 10-16) that the decision below conflicts with *Olatunji* and *Ponnapula* on the abstract question of whether reliance is a necessary precondition to establishing that a statute's application has a retroactive effect. There is no reason to grant review to consider that issue.

As an initial matter, this Court has made clear that retroactivity analysis is informed by "considerations of fair notice, *reasonable reliance*, and settled expectations,'" *Martin*, 527 U.S. at 358 (emphasis added) (quoting *Landgraf*, 511 U.S. at 270), and the Court subsequently reaffirmed the significance of distinct reliance interests—or the absense thereof—in *St. Cyr* and *Fernandez-Vargas* in determining whether application of a provision of IIRIRA would be retroactive. See p. 7-8, *supra*. Consistent with these decisions, the Third Circuit in *Ponnapula*, while rejecting the suggestion that a particular alien must demonstrate "actual [i.e. subjective] reliance" on the pre-existing law, see 373 F.3d at 490-493, grounded its holding in its conclusion that aliens who declined a plea agreement and went to trial "did so in *reasonable reliance* on the availability of [discretionary] relief," *id.* at 494 (emphasis added). And although the Fourth Circuit in *Olatunji* indicated in dictum that "reliance, in any form, is irrelevant to the retroactivity inquiry," that decision preceeded this Court's

decision in *Fernandez-Vargas*, which confirmed that reliance interests are relevant to the inquiry. Moreover, the Fourth Circuit further observed in *Olatunji*, that "[t]o the extent that [reliance] could or should be understood as required," the court "would insist at most upon objectively reasonable reliance." 387 F.3d at 396. The court then explained that reasonable reliance existed in the circumstances of that case. *Id.* at 397.

At any rate, even if dictum in either *Ponnapula* or *Olatunji* could be said to suggest a different understanding from that of the court of appeals below on the precise role of reliance considerations in retroactivity analysis, there is no indication that any such difference in understanding would lead to a different outcome in the circumstances of this case. To the contrary, the Fourth Circuit has held that IIRIRA's repeal of discretionary relief for aggravated felons has no retroactive effect as applied to aliens who, before IIRIRA, had committed an aggravated felony and been convicted at trial. *Chambers*, 307 F.3d at 284. The Third Circuit, in *Ponnapula*, observed that it "highly doubt[ed]" that aliens who went to trial on an aggravated felony before IIRIRA, but had been offered no plea agreement, could assert "a reliance interest that renders IIRIRA's repeal of [discretionary relief] impermissibly retroactive as to them." 373 F.3d at 494. The Fourth Circuit thus has agreed, and the Third Circuit presumably would agree, with the uniform conclusion of courts of appeals that IIRIRA's elimination of discretionary relief for aggravated felons has no retroactive effect merely because an alien's aggravated felony was committed before IIRIRA. See pp. 8-9, *supra*. The Third and Fourth Circuits therefore would also conclude, in agreement with the court of appeals below, that IIRIRA's elimination of

discretionary relief for aliens who have engaged in terrorist activity has no retroactive effect as applied to an alien whose terrorist activity predated IIRIRA.

3. Petitioner contends (Pet. 23-26) that the court of appeals' decision conflicts with this Court's decision in *Clark* v. *Martinez*, 543 U.S. 371 (2005). That claim lacks merit and does not warrant review.

In *Clark*, this Court considered the proper interpretation of 8 U.S.C. 1231(a)(6), which authorizes detention "beyond the removal period" in the case of certain categories of aliens, including (i) aliens who are removable based on their having committed certain crimes, and (ii) aliens who are inadmissible under 8 U.S.C. 1182. The Court explained that, in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001), it had previously construed Section 1231(a)(6) to authorize continued detention of aliens in the first category only as long as reasonably necessary to effectuate the aliens' removal. See *Clark*, 543 U.S. at 377. The Court concluded that the construction of that provision adopted in *Zadvydas* with respect to aliens in the first category was also controlling with respect to aliens in the second category. *Id.* at 378.

Petitioner contends that the court of appeals' decision conflicts with the interpretive approach followed in *Clark* because, under the court of appeals' approach, IIRIRA's repeal of discretionary relief from removal applies to certain categories of aliens (such as petitioner) but does not apply to other categories of aliens (such as the aliens considered in *St. Cyr*). In petitioner's view, that result is inconsistent with *Clark* because it "give[s] the same statutory text a different meaning depending on the party before the court." Pet. 24.

Petitioner's argument reflects a fundamental misunderstanding of this Court's retroactivity decisions. The

entire premise of the presumption against retroactivity is that a statutory amendment will be construed to apply to certain categories of affected persons but not to others—*viz.*, that the new provision will be construed to apply to persons as to whom its application would produce no retroactive effect, but will be construed not to apply to persons as to whom there would be a retroactive effect. See, *e.g.*, *Martin* v. *Hadix*, 527 U.S. 343 (1999) (concluding that limitations on hourly rate for attorney's fee awards enacted by Prison Litigation Reform Act of 1996 (PLRA), 42 U.S.C. 1997e(d)(3), have retroactive effect and thus do not apply to pre-PLRA attorney work, but have no retroactive effect and thus do apply to post-PLRA attorney work even in cases initiated before PLRA's enactment). See also *Fernandez-Vargas*, 126 S. Ct. at 2428 (explaining that, if "applying the statute *to the person objecting* would have a retroactive consequence," then "presumption against retroactivity" results in "construing the statute as inapplicable *to the event or act in question*") (emphasis added). Nothing in this Court's decision in *Clark*—which raised or addressed no questions of retroactivity—calls into question that established feature of retroactivity analysis.[3]

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[3] There is no reason to grant the petition, vacate the judgment below, and remand the case for further consideration in light of this Court's decision in *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. at 2422. See Pet. 22-23. In *Fernandez-Vargas*, this Court considered a retroactivity claim concerning the application of a separate provision enacted by IIRIRA, 8 U.S.C. 1231(a)(5), which renders ineligible for discretionary relief from removal any alien who has reentered the country illegally after having previously been removed. The Court held that the provision's elimination of eligibility for discretionary relief produces no retroactive effect when applied to an alien whose illegal reentry predated IIRIRA's effective date. See 126 S. Ct. at 2431-2434. Nothing in the Court's opinion in *Fernandez-Vargas* casts doubt on the court of

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

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appeals' conclusion below that IIRIRA's elimination of eligibility for discretionary relief for aliens who have engaged in terrorist activity similarly has no retroactive effect as applied to aliens whose terrorist activity predated IIRIRA. To the contrary, the Court's holding and analysis in *Fernandez-Vargas* is fully consistent with that of the court of appeals below.

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No. 05-1312

In the Supreme Court of the United States

BOZO KELAVA,

Petitioner,

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

PAUL J. WATFORD
Counsel of Record
DANIEL L. GEYSER
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

The government's opposition does not deny that this retroactivity issue presents a "recurring question" of "great importance" (Pet. 19, 20), or that it has generated "substantial confusion" among the courts of appeals (Pet. 8). Nor does the government's opposition raise any doubt that there is an undeniable three-way split of authority over whether reliance is the *sine qua non* of impermissible retroactivity. Compare, *e.g.*, *Olatunji* v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004) (Luttig, J.) (reliance not required), with *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004) (Becker, J.) (reasonable, but not subjective, reliance required), with Pet. App. 8a (acknowledging the split of authority and requiring both reasonable *and* subjective reliance). Nor, finally, does the government contend that this split might resolve itself, a point made indisputably clear by *Thom* v. *Ashcroft*, 369 F.3d 158 (2d Cir. 2004) (Calabresi, J.), which held that reliance is essential to the retroactivity inquiry, although a *majority* of that Second Circuit panel would have come out the opposite way in the absence of prior circuit precedent. See Pet. 14-16.

The government simply has no response to the crux of petitioner's argument. Instead, the government goes for the capillaries, asserting that the pertinent circuit holdings are somehow "dict[a]" (an assertion belied by the plain language of the relevant opinions); that, because the conflicting decisions did not address the same subsection of the same statute, the conflict is somehow not squarely presented (a virtual *non sequitur*, given that the split arises where the retroactivity canon is *defined*, not where it is *applied*); and that, because reliance is required by the retroactivity analysis, this Court need not grant review to actually *decide* whether reliance is required by the retroactivity analysis – a question-begging response better suited for merits briefing.

None of the government's arguments refutes the central

point of the petition: the sharp divide over whether reliance is a necessary component of the retroactivity analysis. It is on this point that the Ninth Circuit's decision squarely conflicts with decisions of this Court and other federal circuits. This Court should grant review to resolve that conflict for "the plethora of cases that have inundated our Circuit and our sister Circuits" and finally end the "burdensome and protracted litigation" that this conflict has produced. *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1275 n.7 (11th Cir. 2002).

1. The government makes no serious attempt to address the clear split in authority identified in the petition. Instead, it attempts to confuse matters by characterizing the pertinent holdings of the Third and Fourth Circuits as "dictum" (Opp. 11, 12), but this ignores what those opinions actually say.

a. In his majority opinion announcing that the Fourth Circuit will not require reliance in applying the anti-retroactivity canon, Judge Luttig stated unequivocally: "we *hold* that reliance (whether subjective or objective) is not a requirement of impermissible retroactivity." *Olatunji*, 387 F.3d at 388 (emphasis added). Having so held, the Fourth Circuit then reasoned that "IIRIRA is impermissibly retroactive because it indisputably attached new legal consequences" to an alien's pre-enactment conduct, which alone entitled him to relief without proving any "form of reliance" (*id.* at 389, 396). Accordingly, the issue here – the role of reliance in the retroactivity framework – was properly presented and decided in *Olatunji*, and the Fourth Circuit resolved it by reaching precisely the opposite conclusion that the Ninth Circuit reached below. See Pet. App. 8a, 11a.

The government gamely attempts to cabin *Olatunji*'s unqualified holding as dicta, saying that the panel "observed" that "reasonable reliance existed in the circumstances of that case." Opp. 12 (citing *Olatunji*, 387 F.3d at 396). The government has mistaken a hypothetical for a holding. *Olatunji* did indeed "observe" that "*[i]f* some form of reliance *were* understood as required," the court "would insist at most

upon objectively reasonable reliance" (387 F.3d at 396) – a counterfactual statement that plainly *holds* nothing. But even if that statement were construed as an alternative holding, the government would have established, at most, that *Olatunji* "rests on two or more grounds," which under settled law relegates neither holding "to the category of *obiter dictum*." *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

b. In *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004), Judge Becker, writing for the court, also squarely confronted and decided the reliance aspect of the retroactive impact of § 212(c)'s repeal. 373 F.3d at 494. The court characterized the question before it as "what aliens – if any – who went to trial and were convicted did so in reasonable [not *actual*] reliance on the availability of § 212(c) relief." *Ibid.* In holding that Ponnapula had proved impermissible retroactivity and thus was entitled to relief, the court acknowledged that it was "approaching the issue in this case from the first principles * * * and *rejecting the actual-reliance approach of our sister Courts of Appeals*." *Id.* at 501. Despite its protestations to the contrary, the government actually acknowledges that this holding cannot reasonably be called *dicta*: *Ponnapula*, argues the government, "reject[ed] the suggestion that a particular alien must demonstrate 'actual [i.e. subjective] reliance' on the pre-existing law," and instead "grounded its holding in its conclusion that aliens must prove "'*reasonable reliance* on the availability of [discretionary] relief.'" Opp. 11.

2. Perhaps realizing that it cannot reasonably dispute the presence of this circuit split, the government attempts to reframe the question at a level of generality more hospitable to its argument against certiorari. Specifically, the government suggests that the split is not real because the purportedly conflicting cases addressed different subsections of IIRIRA. Opp. 10-11. Thus, says the government, if there is a circuit split, it is only about an "abstract" retroactivity issue that this Court need not bother to address. Opp. 11.

The government's artful attempt to recast the question

presented fails even on its own terms, however, as the "abstract" issue of reliance is *precisely* where the conflict lies in each conflicting circuit. That those circuits addressed different provisions of IIRIRA is wholly beside the point. Those cases determined "the framework that * * * governs the retroactivity determination" (387 F.3d at 395), and the split arises at the level where the anti-retroactivity canon is *defined*, not where it is *applied*. Change the definition, and the result in each circuit must change – regardless of the particular IIRIRA provision at issue. After *Olatunji*, for example, the Fourth Circuit cannot require reliance in proving impermissible retroactivity – and that holding would apply both to the statutory provisions at issue in that case and here – whereas the Ninth Circuit still holds the opposite. Cf., *e.g.*, *Dinnall* v. *Gonzales*, 421 F.3d 247, 261 n.15 (3d Cir. 2005) (finding itself "bound by *Ponnapula*" and its requirement of "reasonable reliance," even though the two cases addressed different statutory provisions). This *dispositive* issue is not "abstract" in any sense of the word. See Pet. 21-22.

3. The government also contends (at 11) that *Olatunji* "fails to assist petitioner" because his "ineligibility does not result from his *conviction* for engaging in terrorist activity," but rather "his having *engaged in* such activity." That argument begs the question presented. Because only a decision to enter a plea agreement – not to engage in the underlying conduct – could give rise to a plausible reliance interest, the government's distinction matters only if one assumes that *reliance matters* – which is the very issue in this case.[1]

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[1] The government (at 10) incorrectly characterizes *Olatunji* as having found impermissible retroactivity because the alien had *pled* guilty, not because the *conduct* underlying his plea preceded IIRIRA's effective date. The Fourth Circuit's opinion was clear on this point: "Olatunji does not claim that IIRIRA affected the particular *terms* of his agreement or deprived him of consideration obtained during the bargaining process; rather, he claims IIRIRA has attached new legal consequences to the *conviction* that resulted from his plea." 387 F.3d at 396.

Nor is the government correct that "the courts of appeals have uniformly rejected the notion" that IIRIRA's repeal is impermissibly retroactive "merely because an alien *committed* (as opposed to pleaded guilty to) an aggravated felony before IIRIRA." Opp. 8-9. The government fails to mention that, with one exception, those cases follow the Ninth Circuit's approach requiring reliance in order to prove impermissible retroactivity. See Pet. 11 n.4.[2] Those cases thus held *not* that the new law failed to attach a new disability to pre-enactment events, but that the failure to show reliance *in addition to* the new disability made the retroactive application permissible. That is precisely what the circuit split in this case is about.

4. The government also attempts to downplay the circuit split by positing that even if "*Ponnapula* or *Olatunji* could be said to suggest a different understanding from that of the court of appeals below," petitioner would not have been entitled to relief in those circuits – and thus this case is an improper vehicle to address the retroactivity question. Opp. 12. A glance at the case law shows the flaws in that assertion.

a. The government is plainly wrong that petitioner would not have been entitled to relief under *Olatunji*. Because the decision below turned *exclusively* on petitioner's failure to demonstrate reliance on the prior state of the law (Pet. App. 8a), it makes little sense to assert that petitioner would not prevail under a standard that would eliminate the very legal obstacle that denied him relief. *Olatunji*, 387 F.3d at 391.

Perhaps aware of this problem, the government attempts to distract this Court from *Olatunji*'s clear holding by instead citing the Fourth Circuit's *earlier decision* in *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002). But *Olatunji* expressly contemplated and rejected the exact argument that the government presses here. Chambers' claim, the *Olatunji*

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[2] *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002), the sole exception, is discussed at pp. 5-6, *infra*.

court explained, failed not because he could not prove reliance, but because he "did not even fall under the Justice Story retroactivity framework." 387 F.3d at 392 (Chambers' asserted "relevant past conduct" was not his past *criminal* conduct, but rather his "'*decision to go to trial*,'" which itself "did not render him deportable or subject him to certain deportation, regardless of whether pre- or post-IIRIRA law applied'"); *ibid.* (rejecting the *dissent's* theory that *Chambers* held "reliance *is* required" in the retroactivity inquiry).

The government's argument also conflicts with an unbroken line of Fourth Circuit precedent refusing to hold that failure to prove reliance will bar a claim of impermissible retroactivity. See *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102, 109 (4th Cir. 2001) (noting, in dicta, that the lack of "detrimental[] rel[iance] on prior law may not * * * foreclose a claim that § 241(a)(5) * * * operates retroactively," and explaining that *Hughes Aircraft* held "that the amended False Claims Act operated retroactively without discussing whether any party detrimentally relied on previous law"). The government simply cannot show that, had petitioner's appeal arisen in the Fourth Circuit, the result would not have been different. That is the definition of a circuit split.

b. Again downplaying the conflict between the result below and the Third Circuit, the government resorts to attacking a straw man. The government argues (at 12) that because petitioner could not satisfy *Ponnapula*'s "reasonable reliance" requirement, there is no conflict between that case and the decision below. But no one averred otherwise. The Third Circuit's retroactivity framework is relevant not because it would have granted petitioner relief, but because it conflicts with those of the Fourth Circuit (requiring no reliance) and the Ninth Circuit (requiring reasonable *and* subjective reliance). That, again, is the definition of a circuit split, and that, again, underscores the need for this Court's review.

5. Because the government cannot reasonably challenge the existence or depth of this split, it instead spills much ink

arguing on the merits that reliance *is* a necessary component of the retroactivity analysis. Opp. 7-9, 11-12. According to the government, because *INS* v. *St. Cyr*, 533 U.S. 289 (2001), found a retroactive effect upon a showing of reasonable reliance, *every* retroactive effect must now include a showing of reliance. Opp. 8 (petitioner must prove that "[his] decision to engage in terrorist activity" was "made in reliance" on prior law). This argument mirrors the confusion among the lower courts over reliance's role in the retroactivity inquiry, and thus only underscores the need for this Court's review.

First, in asserting that *St. Cyr* has "reaffirmed the significance" or "the absen[c]e" of distinct reliance interests (Opp. 11), the government over-extends *St. Cyr*. That case "did not purport to add a subjective reliance requirement," but rather "applied *Landgraf* to a set of facts that indicated 'an *obvious and severe* retroactive effect.'" *Olatunji*, 387 F.3d at 393 (quoting *St. Cyr*, 533 U.S. at 325); see also *Ponnapula*, 373 F.3d at 499 (same). As petitioner explained (at 18-19) – and the government ignored – the Court's decision to illustrate the effects of impermissible retroactivity by *pointing to* reliance does not suggest that it was *requiring* reliance as a threshold matter. Indeed, because *St. Cyr* found reasonable reliance on its facts, it did not need to reach out and decide if the *absence* of reliance would have defeated the alien's claim.

Second, the government's argument cannot be reconciled with *St. Cyr*'s plain language. Rather than holding (as the government apparently believes it did) that *St. Cyr* introduced an exclusive "reliance" standard, the Court approvingly quoted Justice Story's standard – which does *not* require reliance – and affirmed that even it "'does not purport to define the outer limit of impermissible retroactivity.'" 533 U.S. at 321 n.46 (Justice Story's standard "simply describes several '*sufficient*,' as opposed to '*necessary*,' conditions" for proving retroactivity). The government and the court below thus plainly err in believing that *St. Cyr* transformed reliance

from a sufficient condition into a necessary one. Pet. 18-19.[3]

Moreover, the government notably fails even to address petitioner's showing that this Court has repeatedly defined and applied the anti-retroactivity canon without mentioning reliance, see Pet. 16-17 & n.7 (quoting Justice Story's test and citing five other formulations that fail to mention reliance) – and has done so even where the facts showed the parties had likely *not* relied on the prior state of the law, see Pet. 12-13, 15, 18 (explaining that *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 309 (1994), and *Landgraf* v. *USI Film Prods.*, 511 U.S. 244 (1994), each found impermissible retroactivity on a showing of retroactive *effects*, not reliance).

The decision below sharply departs from this Court's precedent and conflicts with Third and Fourth Circuit decisions that reject the government's overreading of *St. Cyr*. This case squarely presents an opportunity to resolve the deep division among the circuits on this important question.

6. The government asserts that this Court's decision in *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422 (2006), somehow "confirmed that reliance interests are relevant to the inquiry." Opp. 12. But in *Fernandez-Vargas*, the statute at issue was not retrospective in nature, but entirely *prospective*. This Court stated in plain terms that the alien was being punished not for "a past act that he is helpless to undo up to the moment the Government finds him out," but for "his choice to continue his illegal presence, after illegal reentry

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[3] While the government is correct that retroactivity analysis may be "informed by 'considerations of fair notice, *reasonable reliance*, and settled expectations'" (Opp. 11), such considerations are used only as "sound guidance" in "hard cases" (*Landgraf*, 511 U.S. at 270). They are largely irrelevant where, as here, a law indisputably "attaches new legal consequences to events completed before its enactment." *Id.* at 270.

and after the effective date of the new law." *Id.* at 2432.[4]

To the extent that *Fernandez-Vargas* relates to the question presented, it rejects the *government's* position. It explicitly stated that the anti-retroactivity canon "is meant to avoid new burdens imposed on completed acts" (*id.* at 2433), and that "[t]he modern law thus follows Justice Story's definition of a retroactive statute, as * * * 'attach[ing] a new disability, in respect to transactions or considerations already past" (*id.* at 2428) – a rule that does *not* require reliance (*e.g.*, *Olatunji*, 387 F.3d at 391). *Fernandez-Vargas* thus does more than fail to support the government's argument – it contradicts it.[5]

7. In contending that the decision below is consistent with this Court's decision in *Clark* v. *Martinez*, 543 U.S. 371 (2005), the government asserts that petitioner's argument "reflects a fundamental misunderstanding of this Court's retroactivity decisions" (Opp. 13). But it is the government that repeats the critical errors the Ninth Circuit made below.

The government readily adopts the Ninth Circuit's position that a provision may be construed to reach "persons as to whom its application would produce no retroactive effect," but still construed to avoid "persons as to whom there would be a retroactive effect." Opp. 14. This, however, is the very position rejected in *Clark*: "If one [construction] would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." 543 U.S. at 380-81. The government's position leads inexorably to "the

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[4] This also proves that *Fernandez-Vargas* does not cast doubt on *Olatunji*. Opp. 11-12. As this Court addressed a *prospective* application of IIRIRA, it could not define reliance's role in the retroactivity inquiry.

[5] Petitioner previously suggested that the Court might consider holding this petition pending the resolution of *Fernandez-Vargas*. Pet. 22-23. But because *Fernandez-Vargas* had no occasion to resolve the confusion over the role of reliance in the retroactivity inquiry, there is no need to grant the petition, vacate the judgment, and remand in light of that decision.

dangerous principle that judges can give the same statutory text different meanings in different cases." *Id.* at 386.

The government also ignores that "the proper temporal reach of statutes" is a "fundamental policy judgment[]" allocated to Congress, not the courts. *Landgraf*, 511 U.S. at 273. The government is therefore wrong to endorse the notion that Congress delegates to the courts the task of prescribing the temporal scope of ambiguous statutes; to hold otherwise, "in the face of complete congressional silence, is nothing but judicial legislation." *Olatunji*, 387 F.3d at 394.

To the extent the government reads *Fernandez-Vargas* to command such a case-by-case approach with its suggestion to "construe[] [a retroactive] statute as inapplicable *to the event or act in question*," 126 S. Ct. at 2428, the government has "mistake[n] the reservation of a question with its answer." *Clark*, 543 U.S. at 378. Because the statutory text in the instant case "provides for no distinction" between different classes of aliens, *id.* at 379, its meaning is not "subject to change depending on the presence or absence of [retroactivity] concerns in each individual case," *id.* at 382.

Finally, the government, like the court below, relies on *Martin* v. *Hadix*, 527 U.S. 343 (1999), to suggest that a statute can be construed to apply both prospectively and retrospectively at the same time. *Martin* endorsed no such thing. *Martin* held that the statute applied *prospectively* only – and it thus applied prospectively to *all* groups. 527 U.S. at 358. The fact that prior law still governed pre-enactment conduct hardly proved that the temporal scope of the new statute changed depending on the party before the court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL J. WATFORD
Counsel of Record
DANIEL L. GEYSER
Munger, Tolles & Olson LLP
355 South Grand Avenue
Suite 3500
Los Angeles, CA 90071
(213) 683-9100

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